# Jurisdictional Statement

81-2008

No.

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ALEXANDER L. STEVAS
CLERK

IN THE

# Supreme Court of the United States

October Term, 1981

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THE PROCESS GAS CONSUMERS GROUP,
THE AMERICAN IRON AND STEEL INSTITUTE,
AND THE GEORGIA INDUSTRIAL GAS GROUP,
*Appellants,*

v.

CONSUMER ENERGY COUNCIL OF AMERICA,
CONSUMER FEDERATION OF AMERICA,
AND PUBLIC CITIZEN,
*Appellees.*

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**ON APPEAL FROM**
**THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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## JURISDICTIONAL STATEMENT

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April 29, 1982

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## QUESTIONS PRESENTED

(1) Whether the lower court should have reached the constitutional issue inasmuch as there were two statutory grounds upon which the case should have been decided.

(2) Whether, even if the constitutional issue were appropriately reached and decided, appellees could obtain the relief they sought below (*i.e.*, that FERC Order No. 80 be made effective) since

> (a) the Congressional review provisions challenged by appellees are not severable from the incremental pricing provision whose benefits appellees seek *and/or*
>
> (b) the FERC, consistent with both its statutory authority and the Administrative Procedure Act, properly revoked Order No. 80.

(3) Whether, if this Court were to affirm the lower court's decision in *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408 (9th Cir. 1980), *consideration of juris. postponed until hearing on merits*, 102 S.Ct. 87 (1981) (holding unconstitutional a one-House veto provision in Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254), such decision would control the instant case and compel summary affirmance of the lower court's decision herein.

Appellants respectfully submit that each of these questions should be answered in the negative.

## PARTIES BELOW*

Following are the parties to the proceeding in the court whose judgment is sought to be reviewed herein: American Gas Association, American Iron and Steel Institute, Consumer Energy Council of America, Consumer Federation of America, Federal Energy Regulatory Commission, Georgia Industrial Gas Group, Interstate Natural Gas Association of America, Petrochemical Energy Group, Process Gas Consumers Group, Public Citizen, and United Distribution Companies. The United States Senate, the Speaker of the House of Representatives, and the United States appeared as *amici curiae*.

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*Appellant, the Process Gas Consumers Group ("PGC"), is an association of industrial consumers of natural gas. PGC is participating in this proceeding through an *ad hoc* committee, the members of which are:

Aluminum Company of America
American Can Company
American Standard Inc.
Armco Inc.
Bethlehem Steel Corporation
Borg-Warner Corporation
Burlington Industries, Inc.
Cone Mills Corporation
Corning Glass Works
Dan River Inc.
General Motors Corporation
3M Company
Owens-Corning Fiberglas Corporation
United States Steel Corporation

Appellant, the American Iron and Steel Institute ("AISI"), is a trade association representing the steel industry. The corporate members of AISI are:

Acos Anhanguera S.A.
AL Tech Specialty Steel Corporation

The Algoma Steel Corporation, Limited
Allegheny Ludlum Industries, Inc.
American Cast Iron Pipe Company
Armco Inc.
Atlantic Steel Company
Atlas Steels
The Babcock & Wilcox Company
Bekaert Steel Wire Corporation
Bethlehem Steel Corporation
California Steel Company
Carpenter Technology Corporation
The Cleveland-Cliffs Iron Company
CF&I Steel Corporation
Columbia Tool Steel Company
Compañia de Acero del Pacifico S.A.
Consolidated Metals Corp.
Continental Copper & Steel Industries, Inc.
Copperweld Corporation
Crucible Materials Group, Colt Industries, Inc.
C.V.G. Siderurgica del Orinoco C.A.
Cyclops Corporation
Dominion Foundries and Steel, Limited
Electralloy Corporation
A. Finkl & Sons Co.
Florida Steel Corporation
Fort Howard Steel & Wire
Fundidora Monterrey, S.A.
Georgetown Steel Corporation
Guterl Special Steel Corp.
The Hanna Mining Company
Harsco Corporation
HYSLA
Ingersoll Johnson Steel Company
Inland Steel Company
Intercontinental Metals Corporation
Interlake, Inc.
Jessop Steel Company
Jones & Laughlin Steel Corporation
Earle M. Jorgensen Company
Joslyn Stainless Steels
Kaiser Steel Corporation
Keystone Consolidated Industries, Inc.
Laclede Steel Company
Lone Star Steel Company

Lukens Steel Company
McLouth Steel Corporation
National Steel Corporation
North Star Steel Company
Northwestern Steel and Wire Company
Oglebay Norton Company
Penn-Dixie Steel Corporation
Phoenix Steel Corporation
Pickands Mather & Co.
Republic Steel Corporation
Roblin Industries, Inc.
Rome Strip Steel Company, Inc.
Sandvik, Inc.
Sharon Steel Corporation
Sharon Tube Company
Shenango Incorporated
SIDBEC-DOSCO
The Steel Company of Canada, Limited
Sydney Steel Corporation
Teledyne Columbia-Summerill
Teledyne Vasco
The Timken Company
United States Steel Corporation
Valley Mould and Iron Company
Washington Steel Corporation
Wheatland Tube Company
Wheeling-Pittsburgh Steel Corporation
Wisconsin Steel

Appellants, the Georgia Industrial Gas Group ("GIG"), is a coalition of industrial companies which consume natural gas in facilities located in the State of Georgia. The members of GIG participating in this proceeding are:

American Industrial Clay Company of Sandersville
Anglo-American Clays Corporation
Burgess Pigment Company
Chemical Products Corporation
Engelhard Corporation
Freeport Kaolin Company
General Motors Corporation
Georgia Kaolin Company
Thiele Kaolin Company

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ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## JURISDICTIONAL STATEMENT

---

The Process Gas Consumers Group, the American Iron and Steel Institute, and the Georgia Industrial Gas Group, the appellants, appeal from the final judgment, dated January 29, 1982, of the United States Court of Appeals for the District of Columbia Circuit, holding that the one-House legislative veto provision in Section 202(c) of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C.

§ 3342(c), is unconstitutional, and ordering the Federal Energy Regulatory Commission ("FERC") to reinstate, subject to reconsideration, FERC Order No. 80, *reprinted in* 45 Fed. Reg. 31622 (May 13, 1980), which was promulgated pursuant to said NGPA Section 202. Appellants submit this jurisdictional statement to show that this Court has jurisdiction of this appeal and that substantial questions are presented.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, the slip opinion of which appears in the appendix hereto, p. 1a, *infra,* is as yet unreported. That court's order, dated March 10, 1982, denying rehearing appears at p. 210a of the appendix.

FERC Order No. 80 issued May 6, 1980, is set forth in the appendix hereto at pp. 123a-195a (pp. 17-89 of H. Rep. No. 96-938, 96th Congress, 2d Session, May 12, 1980). The FERC's orders denying rehearing, issued August 1 and October 2, 1980, respectively, appear in the appendix hereto at pp. 196a and 204a, respectively.

## JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, holding unconstitutional Section 202(c) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3342(c), was entered on January 29, 1982. *See* p. 208a, *infra.* A petition for rehearing and suggestion for rehearing *en banc* were entertained and denied on March 10, 1982, *See* pp. 210a-212a, *infra.* An agency of the United States was the respondent below.

A notice of appeal to this Court was duly filed by appellants in the United States Court of Appeals for the District of Columbia Circuit on March 15, 1982. *See* p. 213a, *infra*.

This appeal is being docketed in this Court within 60 days from appellants' filing of their notice of appeal below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1252.

## THE STATUTE INVOLVED

United States Code, Title 15:

§ 3342. Amendment expanding application for other industrial uses

(a) In general

(1) Commission rule

Not later than 18 months after November 9, 1978, the Commission shall, by rule, prescribe an amendment to the rule required under section 3341 of this title designed to provide for the passthrough, in accordance with the provisions of this subchapter, of the costs of natural gas which are –

(A) described in section 3343 of this title; and

(B) incurred by any interstate pipeline.

(2) Effectiveness

The amendment required by this section, and any amendment to the rule under section 3341 of this title which is applicable to facilities to which the amendment required by this section applies (other than a technical or

clerical amendment) shall take effect only as provided under subsection (c) of this section.

(b) Expanded application

The requirements of the rule under section 3341 of this title, as amended under subsection (a) of this section, shall apply with respect to the industrial use of natural gas (as defined by the Commission in such rule), including boiler fuel use of natural gas (as defined in section 3341(c)(2) of this title) by –

(1) any industrial boiler fuel facility (as defined in section 3341(c)(1) of this title); and

(2) any industrial facility which is within a category defined by the Commission in such amendment as subject thereunder to the requirements of such rule which is not exempt under section 3346 of this title.

(c) Congressional review

(1) In general

Any amendment, the effectiveness of which is subject to this subsection, shall take effect beginning with the first month which begins more than 30 days after the first 30 calendar days of continuous session of Congress (determined in accordance with section 3417(b) of this title[)] after a copy of such amendment has been submitted to each House of the Congress or on such later date, not more than 90 days thereafter, as may be provided in such amendment unless, during such 30 day period of continuous session of Congress, either House of the Congress adopts a resolution of disapproval described in section 3417(c)(3) of this title with respect to such amendment.

(2) Authority in the event of Congressional disapproval

(A) Authority to resubmit

If either House of the Congress adopts a resolution of disapproval with respect to the amendment required under subsection (a) of this section (or any amendment proposed and submitted under this subparagraph), the Commission may thereafter submit to each House of the Congress an amendment, satisfying the requirements of subsections (a) and (b) of this section, which amendment shall take effect as provided under paragraph (1).

(B) Limitation

The authority of subparagraph (A) may not be exercised –

> (i) earlier than 6 months after the date of the adoption of the most recent resolution of disapproval with respect to any such amendment under this section; and
>
> (ii) later than 2 years after the date of the adoption of any resolution of disapproval described in section 3417(c)(3) of this title with respect to the amendment required under subsection (a) of this section.

Pub. L. 95-621, title II, § 202, Nov. 9, 1978, 92 Stat. 3372.

Other relevant statutory provisions – 15 U.S.C. §§ 3341, 3346(d) and 3416 – are set forth in the appendix at p. 224a, *infra*.

## STATEMENT OF THE CASE

Title II of the NGPA requires the FERC to implement a so-called "incremental pricing" program under which certain gas acquisition costs incurred by interstate pipelines

are collected only from certain industrial users, rather than from residential, commercial, and other users. NGPA Section 201, 15 U.S.C. § 3341, requires the FERC to promulgate, within one year of the statute's enactment, a Phase I rule applying only to "the boiler fuel use of natural gas by any industrial boiler fuel facility." NGPA Section 202, 15 U.S.C. § 3342, requires the FERC to issue, within 18 months of enactment, a Phase II rule applying to any industrial boiler fuel facility, plus "any industrial facility which is within a category defined by the Commission" and not otherwise exempt under the statute. Subsections 202(a)(2) and (c), however, provide that a rule issued under Section 202 "shall take effect only" if neither House of Congress adopts within 30 days a resolution disapproving it.

On May 6, 1980, the FERC issued a rule (Order No. 80) under NGPA Section 202. On May 20, 1980, the House of Representatives adopted H. Res. 655, a resolution disapproving the rule, by a vote of 369 to 34. Nevertheless, the Consumer Energy Council of America, Consumer Federation of America, and Public Citizen (hereinafter collectively referred to as "CECA"), the appellees herein, petitioned the FERC on June 5, 1980, for rehearing, asking that Order No. 80 be made effective on grounds that the House's action and NGPA Subsection 202(c) were unconstitutional. On August 1, 1980, the FERC refused to pass on that constitutional question, denied CECA's petition for rehearing, and revoked Order No. 80 (hereinafter the "revocation order"). CECA sought rehearing of the revocation order, claiming that the revocation was not in accordance with the Administrative Procedure Act, 5 U.S.C. § 553. Upon denial of rehearing, *see* appendix, *infra,* at pp. 196a, 204a, CECA sought review of the FERC's orders in the United States Court of Appeals for the District of Columbia Circuit.

Appellants intervened in support of the FERC in the court below, taking no position on the constitutional question raised by CECA. However, citing the statutory framework of NGPA Section 202 and the regulatory action which had been taken by FERC, appellants argued that, *regardless* of how the constitutional question might be resolved, the court could not grant to CECA the relief it was seeking (*i.e.*, implementation of FERC Order No. 80).

On January 29, 1982, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision (Case Nos. 80-2184, *et al.*) holding that it had jurisdiction of the matter, that the constitutional issue was properly presented, that the "one-house legislative veto provision in section 202(c) of the NGPA is unconstitutional," that that provision is severable from the remainder of Section 202, that the FERC's August 1 revocation order was invalid, and that "the Phase II rule should become effective absent further Commission action to postpone or amend it." *See* appendix, *infra,* at pp. 7a, 16a, 30a.

On February 26, 1982, appellants filed in the court below a notice of appeal to this Court. The notice, however, was rendered null and void by another party's timely filing below of a petition for rehearing. That petition was denied by the court below on March 10, 1982, and, on March 15, 1982, appellants refiled their notice of appeal to this Court. By its orders of January 29, March 15, and March 25, 1982, the court below successively stayed the issuance of its mandate through May 2, 1982.

## THE QUESTIONS ARE SUBSTANTIAL

### 1. The constitutional issue should not have been reached below and should not be reached by this Court.

"Although Congress and the Executive have been at odds for decades over the constitutionality of the legislative veto, the Supreme Court has never ruled on the issue . . . . [T]his case is truly one of first impression." (App. at 38a, 43a). With these words, the court below proceeded to decide a fundamental constitutional issue which it was aware might have "far-reaching effects on the operation of the National Government." App. at 103a.

But, in its haste to address an undoubtedly substantial constitutional issue, the court violated an even more substantial principle of constitutional jurisprudence. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service, Inc. v. McLaughlin,* 323 U.S. 101, 105 (1944), *quoted in New York Transit Authority v. Beazer,* 440 U.S. 568, 582 (1979). The record below presented two clear alternative grounds upon which the case might have been decided, including a fair construction of the statute by which the constitutional question might have been avoided. *See Rescue Army v. Municipal Court,* 311 U.S. 549, 569 (1947). Consideration of either of those alternative grounds compels the conclusion that the relief sought by CECA below (*i.e.*, that FERC Order No. 80 be made effective) cannot be granted.

#### (A) Severability

The unambiguous language of NGPA Section 202, strongly supported by the legislative history of NGPA Title II, demonstrates clearly that the Congressional review pro-

visions in Section 202 are not severable from the rest of that section. First, Subsection 202(c), which details the Congressional review mechanism, is not severable from Subsection 202(a), the general provision which requires the FERC to prescribe a Phase II rule. Moreover, and perhaps even more significantly, Subsection 202(a)(1), the Phase II requirement, cannot be severed from Subsection 202(a)(2), the provision that any Phase II rule "shall take effect only" via the Congressional review procedure.

Thus, even if Subsection 202(c) were unconstitutional, the remainder of Section 202 must fall with it, and there would be no statutory basis for *any* Phase II rule to be promulgated. Therefore, under any scenario—*i.e.*, whether or not Section 202(c) is unconstitutional—CECA cannot be afforded the relief it sought below. The lower court erred in finding to the contrary and proceeding to decide the constitutional issue.

**(B) Revocation of Order No. 80**

Even if the Congressional review provisions in NGPA Section 202 were to be severable from their context, the court below should not have reached the constitutional issue – nor should this Court reach the constitutional issue – because Order No. 80 was properly disavowed and revoked by the FERC itself.

The FERC had express authority, both specifically under NGPA Section 201, 15 U.S.C. § 3341, and generally under its rulemaking and rehearing powers, to revoke Order No. 80 precisely as it did. The court below erred in finding that the FERC's revocation order violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(b), (c). Contrary to that finding, *see* App. at p. 33a, Order No. 80's revocation did *not* require renewed notice and comment because the rule was never final within the meaning of the APA. At no time did Order No. 80 have the

force of law or "general or particular applicability and future effect . . . ." 5 U.S.C. § 551(4). The FERC revoked only *proposed,* non-final regulations; since it did not repeal a rule within the meaning of the APA, it did not engage in an independent, second rulemaking proceeding requiring separate notice and comment opportunities.

Order No. 80's lack of finality at the time of its revocation is further underscored by the fact that, under the NGPA, (1) judicial review may be obtained only of *final* FERC orders, 15 U.S.C. § 3416(a)(4), and (2) no order becomes appealable (*i.e.,* final) until the FERC "shall have finally acted" upon any timely filed application for rehearing, 15 U.S.C. § 3416 (a)(2)(B). At the time that the FERC revoked the proposed regulations in Order No. 80, CECA's application for rehearing had been filed but not yet "finally acted" upon and no judicial appeal was yet possible. Thus, no final and appealable rule, within the specific meaning of the NGPA, had yet been issued. Moreover, well settled general principles of administrative law provide that there is no final action until a rehearing request is denied and that "when the party elects to seek a rehearing there is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary." *Outland v. CAB,* 109 U.S. App. D.C. 90, 93, 284 F.2d 224, 227 (1960).

Since then, the FERC did not repeal a final rule within the meaning of either the APA or NGPA, but merely exercised its lawful rehearing authority, the court below erred in concluding that additional notice and opportunity for comment were required, and that, as a result, the revocation order was invalid.

The court below also erred in concluding that interested parties had no prior notice or opportunity to comment on

the narrow incremental pricing rule which remained (and still remains) in effect after the revocation of Order No. 80. From the very beginning of the rulemaking proceeding and throughout its six-month duration, the FERC repeatedly recognized the view that it could limit its final Phase II rule proposal to the category mandated under NGPA Section 202(b)(1) and exercise its discretion to include no additional category of facilities under NGPA Section 202(b)(2). Interested parties were on notice that a rule of this scope was among the alternatives available to the FERC, and, as acknowledged in Order No. 80 itself, hundreds of commenters focused substantial attention on this alternative. *This is precisely the scope of the incremental pricing program which resulted when the FERC revoked Order No. 80;* the program today applies to the mandatory category described in NGPA Section 202(b)(1) but to no additional discretionary category under Section 202(b)(2).

Appellees may well have been disappointed that the FERC decided to revoke Order No. 80 and leave only Phase I in effect (the exact equivalent of the minimum scope Phase II alternative); they had, however, been on notice throughout the proceeding that such a rule was within the range of legitimate Phase II alternatives which the FERC could adopt under NGPA Section 202(b). Hence, the notice and opportunity for comment afforded by the FERC were entirely adequate with respect to the revocation order; the APA provides no grounds upon which to hold that order invalid.

Moreover, the FERC was fully justified, even required, to revoke Order No. 80. In its revocation order, the FERC candidly acknowledged that it believed that it was "up to Congress" to make the social and economic judgments called for under Section 202 and that, therefore, the agen-

cy itself had not made those judgments or even considered the many comments made in the rulemaking with respect to those issues. Thus, FERC reasoned, if its views regarding its mandate from Congress and the validity of the Congressional review process were erroneous, then its refusal to consider material arguments made in the course of the rulemaking with respect to the proper scope of Phase II meant that "Order No. 80 cannot be the product of reasoned decision-making." That being so, the Commission concluded that it was "neither authorized nor required to place [Order No. 80] in effect." App. at 199a. Indeed, it would have been manifest error and a violation of fundamental principles of administrative law for the FERC to have allowed Order No. 80 to remain on the books with the possibility of it becoming effective at some later date.

2. **Appellees cannot be afforded relief.**

Even if this Court were to decide to reach the issue of the constitutionality of NGPA Section 202(c), appellants respectfully submit that the reasons summarized in the preceding section — the inseverability of the Congressional review provisions and the FERC's lawful revocation of Order No. 80 — preclude this Court from affirming the relief granted to appellees by the court below. Even if the Court determines that the severability and revocation issues should be addressed only *after* a finding of unconstitutionality, proper resolution of either of these issues would require that the case be remanded to the lower court with instructions to dismiss it as moot insofar as the relief requested by CECA cannot be granted.

3. **Plenary review is necessary and justified.**

Whether the Court's inquiry with respect to the severability and revocation issues precedes or follows any

constitutional inquiry, it is plain that plenary review of the lower court's holding on these two non-constitutional issues is required. If these issues are addressed first, such plenary review will allow the Court appropriately to decide this matter on non-constitutional grounds. But even if the constitutional issue is addressed first and the decision below is upheld, plenary review of the non-constitutional issues would remain necessary for two reasons:

> (1) to provide the lower courts with much-needed guidance as to the severability standards to be applied in the literally hundreds of legislative veto cases which would certainly follow any holding that NGPA Section 202(c) is unconstitutional, and
>
> (2) to prevent the enormously adverse effects of implementation of regulations which were both overwhelmingly disapproved (even *if* invalidly) by the House of Representatives and acknowledged by the FERC not to be the product of reasoned decision-making.

In the decision appealed from, the lower court ordered the FERC to reinstate Order No. 80 but delayed the effectiveness of the rule for 30 days during which time "the Commission may consider whether to amend the substance of the rule or, in order to provide time for sufficient consideration, whether to postpone the effective date further." App. at 104a. Significantly, however, the lower court "express[ed] no views as to the precise scope of the Phase II delegation or the extent, if any, of the Commission's power to delay, amend, or revoke the rule." *Id.*

Appellants respectfully submit that the "precise scope of the Phase II delegation" was raised below, that that issue is properly before this Court, and that plenary review of that

issue is warranted even if the Court chooses otherwise to affirm the decision below. Such review is necessary because, apart from the "test case" aspects of this proceeding relating to important constitutional questions, this case has very real, immediate, and significant effects on the appellants and others. The record below demonstrates compellingly that implementation of Order No. 80 would immediately impose substantial financial burdens (conservatively estimated at hundreds of millions of dollars annually) on industrial gas users and, as a further result, plunge the entire interstate natural gas market into chaos. The FERC itself predicted the serious consequences which would follow if its Phase II proposal were to be implemented without further extensive evaluation. *See* App. 199a-201a.

Since the lower court expressed no views as to what actions the FERC could lawfully take on remand, summary affirmance by this Court of the decision appealed from would result, at minimum, in prolonged uncertainty for those affected by Title II and perhaps an immediate devastating financial burden on U.S. industry. In the absence of guidance from this Court, any action which the FERC might take upon remand – or, indeed, a decision by FERC to take no action at all – would be certain to engender new judicial proceedings brought by one or more of the parties below.

Therefore, in the event that the Court is disposed to affirm the decision below, appellants urge that plenary review be afforded the statutory issue of what action(s) the FERC may lawfully take under NGPA Title II upon remand.

Finally, a word must be said about the relation between this case and *Chadha v. Immigration and Naturalization*

*Service*, 634 F.2d 408 (9th Cir. 1980), *consideration of juris. postponed until hearing on merits*, 102 S.Ct. 87 (1981). A decision by this Court reversing the Ninth Circuit's decision in *Chadha* and upholding the constitutionality of the one-House veto would likely warrant summary reversal of the lower court's decision in this case. In contrast, however, affirmance of the lower court's decision in *Chadha* would *not* warrant summary affirmance of the decision appealed from here. As the court below specifically noted;

> "[T]he *Chadha* court sought to minimize the reach of its holding:
>
> > '[W]e are not here faced with a situation in which the unforeseeability of future circumstances or the broad scope and complexity of the subject matter of an agency's rulemaking authority preclude the articulation of specific criteria in the governing statute itself. Such factors might present considerations different from those we find here, both as to the question of separation of powers and the legitimacy of the unicameral device.' " App. at 42a-43a, quoting *Chadha, supra*, 634 F.2d at 433 (footnotes omitted).

Appellants believe that it is manifest from the record below that the lower court's conclusions with respect to the severability and revocation issues were erroneous and that that court erred in reaching the constitutional issue. For this reason, appellants believe that the decision below should be summarily reversed. However, even if this Court should decide to reach the constitutional issue, appellants submit (1) that a prior decision affirming *Chadha* should not control the outcome herein and dictate summary affirmance, and (2) that, regardless of the outcome of the constitutional issue herein, the case should be

remanded to the lower court with instructions to dismiss insofar as appellees cannot be granted the relief they sought below.

## CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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April 29, 1982

# Appendix

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AND RELATED CASES

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## APPENDIX TO JURISDICTIONAL STATEMENT

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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 80-2184

CONSUMER ENERGY COUNCIL OF AMERICA,
CONSUMER FEDERATION OF AMERICA,
and PUBLIC CITIZEN, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

PROCESS GAS CONSUMERS GROUP, ET AL.,
UNITED DISTRIBUTION COMPANIES,
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,
AMERICAN GAS ASSOCIATION,
PETROCHEMICAL ENERGY GROUP, INTERVENORS

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No. 80-2312

CONSUMER ENERGY COUNCIL OF AMERICA,
CONSUMER FEDERATION OF AMERICA,
and PUBLIC CITIZEN, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

UNITED DISTRIBUTION COMPANIES,
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,
PROCESS GAS CONSUMERS GROUP, ET AL.,
AMERICAN GAS ASSOCIATION,
PETROCHEMICAL ENERGY GROUP, INTERVENORS

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Petitions for Review of an Order of the
Federal Energy Regulatory Commission

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Argued 10 September 1981

Decided 29 January 1982

Judgment entered this date

*Alan B. Morrison*, with whom *John Cary Sims* was on the brief for petitioners.

*Larry L. Simms*, Acting Assistant Attorney General, Department of Justice, of the bar of the Supreme Court of Vermont *pro hac vice* by special leave of Court, with whom *Harold H. Bruff* and *Anthony J. Steinmeyer*, Attorneys, Department of Justice, were on the brief for amicus curiae, United States of America.

*Jerome M. Feit*, Deputy Solicitor, Federal Energy Regulatory Commission, with whom *Jerome Nelson*, Acting General Counsel, and *Stephen R. Melton*, Attorney, Federal Energy Regulatory Commission, were on the brief for respondent.

*Edward J. Grenier, Jr.*, with whom *Michael J. Shea*, *Glen S. Howard*, *Marilyn L. Mvench*, and *David A. Gross* were on the brief for intervenors, The Process Gas Consumers Group, et al.

*C. William Cooper*, with whom *Richard M. Merriman*, *David G. Hanes*, *L. Peter Farkas*, *John D. McGrane*, *Peyton G. Bowman, III* and *John R. Schaefgen, Jr.* were on the brief for intervenors, United Distribution Companies.

*Michael Davidson*, Senate Legal Counsel, with whom *M. Elizabeth Culbreth*, Deputy Senate Legal Counsel, and *Charles Tiefer*, Assistant Senate Legal Counsel, were on

the brief for amicus curiae, United States Senate, urging dismissal.

*Eugene Gressman* for amicus curiae, Speaker of the United States House of Representatives, urging dismissal.

*John A. Myler* was on the brief for intervenor, American Gas Association.

*Lawrence V. Robertson, Jr.* was on the brief for intervenor, Interstate Natural Gas Association of America.

*R. Gordon Gooch, B. Donovan Picard, Thomas J. Eastment* and *John W. Leslie* were on the brief for intervenor, Petrochemical Energy Group.

Before: BAZELON, *Senior Circuit Judge*, WILKEY and EDWARDS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILKEY.

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WILKEY, *Circuit Judge*: Petitioners Consumer Energy Council of America, Consumer Federation of America, and Public Citizen ("CECA") challenge the constitutionality of a legislative veto provision in the Natural Gas Policy Act of 1978 ("NGPA").[1] Title II of the NGPA directs the Federal Energy Regulatory Commission ("FERC") to implement an "incremental pricing" program, which shifts part of the price increase resulting from the deregulation of new natural gas from residential users to industrial users. Phase I of the program directs the Commission to promulgate within one year a rule applying only to "boiler fuel use of natural gas by any industrial boiler fuel facility."[2] Phase II requires the Commission to issue within eighteen months a rule expanding the program to "any industrial facility which is within a category defined by the Commission" and not otherwise exempt.[3] The statute provides, however, for the Phase II rule to take effect only if neither house of Congress adopts within thirty days a resolution disapproving the rule.[4]

FERC issued its Phase II rule on 6 May 1980, three days before the deadline. Two weeks later the House of Representatives voted its disapproval. CECA then filed a petition for rehearing asking the Commission to make the rule effective in spite of the House's action, on the ground that the one-house veto provision was unconstitutional. Refusing to pass on the constitutional question, the Commission denied the petition and revoked the Phase II rule. CECA sought review in this court, and also petitioned FERC for rehearing on the revocation order. This

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[1] Pub. L. No. 95-621, 92 Stat. 3351 (codified at 15 U.S.C. §§ 3301-3342 (Supp. III 1979)).

[2] 15 U.S.C. § 3341(b) (Supp. III 1979).

[3] *Id.* §§ 3342(a)(1), (b)(2).

[4] *Id.* § 3342(c).

second petition was denied, and CECA filed another petition in this court. The two petitions for review were consolidated and are now before us.

FERC has not taken a position on petitioners' constitutional claims, asserting that this court may dispose of the case on other grounds.[5] It argues that the legislative veto provision is not severable from the provision authorizing the Commission to promulgate a Phase II rule, leaving petitioners with no claim for effective relief even if section 202(c) is declared unconstitutional. It also contends that the case is moot because the rule was properly revoked. The United States Senate and the Speaker of the House of Representatives have entered the case as amici curiae. In addition to supporting FERC's position, they contend that this court lacks jurisdiction to hear the case, a contention both FERC and CECA dispute, and that the legislative veto provision is constitutional. The United States has also appeared as amicus curiae, taking the opposing view that the veto provision is unconstitutional. Finally, several industry groups have filed briefs as intervenors, arguing generally in favor of the positions of both FERC and Congressional amici.[6]

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[5] FERC's view is "that sound administrative practice requires the presumption of constitutional validity of the statutes entrusted to this Commission for implementation." FERC Order Denying Rehearing and Revoking Amendments Made by Order No. 80, at 3 (1 Aug. 1980) [hereinafter "Revocation Order"], *reprinted in* 45 Fed. Reg. 54741 (18 Aug. 1980), and Appendix A ("App. A") at 9.

[6] Three sets of intervenors have appeared: (1) American Gas Association, Interstate Natural Gas Association of America, and United Distribution Companies ("Gas Suppliers"); (2) Process Gas Consumers Group, American Iron and Steel Institute, and Georgia Industrial Gas Group ("Gas Consumers"); and (3) Petrochemical Energy Group ("PEG"). Gas Suppliers address both the statutory and constitutional issues, whereas Gas Consumers and PEG address only the statutory issues.

Having determined that we have jurisdiction and that the constitutional issue is properly presented, we hold that the one-house legislative veto provision in section 202(c) of the NGPA is unconstitutional. Accordingly, we reverse and remand the Commission's orders and instruct it to reinstate the Phase II rule. The Commission is free, however, on its own motion and pursuant to the notice and comment requirements of the Administrative Procedure Act ("APA"),[7] to consider amending the Phase II rule or changing its effective date.

## I. Background

### A. *Structure of the NGPA*

Title I of the NGPA provides for the phased deregulation of natural gas prices. It sets allowable wellhead prices of gas considerably higher than under the cost-based system of rate regulation, and provides that "new" natural gas prices will be decontrolled on 1 January 1985.[8] Title II of the Act provides for incremental pricing as a means of easing the transition to deregulation. Incremental pricing is a "mechanism for passing through to end users some of the increased prices for natural gas," [9]

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[7] 5 U.S.C. §§ 553(b), (c) (1976).

[8] 15 U.S.C. §§ 3311-3320 (Supp. III 1979) (wellhead price controls); *id.* § 3331 (price decontrol for new gas).

[9] H.R. Rep. No. 1752, 95th Cong., 2d Sess. 68 (1978) (Joint Explanatory Statement of the Committee on Conference) [hereinafter "Conference Report"].

> Incremental pricing allocates a specified portion of the acquisition costs of natural gas to certain industrial users. Incremental pricing operates in this fashion: all the money that an interstate pipeline pays for different categories of natural gas in excess of certain specified "threshold" levels—which vary from category to category and increase from month to month—are added together and assigned to a special account. The amount of money in the account is recovered from the pipeline's distribution

so that large industrial gas users will pay a disproportionate share of the increases in gas prices. The program's goals are "to restrain the prices paid by pipelines for natural gas supplies, particularly after deregulation, and to protect residential consumers from higher prices resulting from deregulation." [10]

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company customers by use of a surcharge mechanism according to the amount of gas the distribution companies sell to industrial customers subject to incremental pricing. The gas distribution company, in turn, is required to increase the rates to its industrial customers subject to incremental pricing, to recover its payment to the pipeline. The incremental pricing surcharge, however, may not increase the price of gas to industrial users above the alternative fuel price established by the Commission. If a gas distributor is unable to pass through his entire surcharge because his incrementally priced customers are already paying the alternative fuel price, the surcharge is reduced to that distributor and increased to the remaining distributors on the pipeline system whose industrial customers can absorb additional costs because they are paying less than the alternative fuel price. When all incrementally priced industrial facilities served by a pipeline reach equivalency with the alternative fuel price, amounts in excess of that necessary to keep those customers at equivalency may be allocated in whatever manner by which the pipeline and distribution companies are permitted to recover normal costs.

H.R. REP. No. 938, 96th Cong., 2d Sess. 3-4 (1980) [hereinafter "Veto Report"].

[10] Veto Report, *supra* note 9, at 4. The first goal was designed to facilitate an orderly transition from a regulated to a deregulated market. Congress feared that without a "market ordering" device such as incremental pricing, "the price of deregulated gas would be bid to excessively high levels" by pipelines which could continue to buy old gas at relatively low prices. *Id.* Accordingly,

> Congress sought to eliminate this possible incentive for interstate pipelines to bid excessively high prices by initially increasing the price of gas delivered to large, price sensitive industrial customers to a level equal to the

Title II provides for implementation of incremental pricing in two phases. Section 201 requires FERC within one year to issue an incremental pricing rule covering boiler fuel users.[11] Section 202(a) provides that within eighteen months "the Commission shall, by rule, prescribe an amendment to the [Phase I] rule . . ."[12] to extend incremental pricing to other industrial users. However, the Phase II rule "shall take effect only as provided under subsection (c) of this section,"[13] which states that the rule shall take effect after thirty legislative days "unless, during such 30 day period of continuous session of Congress, either House of the Congress adopts a resolution of disapproval."[14] Thus, either house of Congress may veto FERC's Phase II rule by majority vote.

B. *Legislative History of Title II*

In April 1977 President Carter proposed to Congress a comprehensive energy program. In the congressional debate that followed a principal issue was whether to remove wellhead price controls on natural gas. There was widespread agreement that price controls should at

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cost of their alternative fuel. Under this regime, Congress anticipated that pipelines, whose revenues depend upon volumetric throughput, would seek to minimize further increases in the cost of gas that might occur upon deregulation, for fear that industrial demand for natural gas (and therefore throughput revenues) would decline.

FERC Order No. 80, at 9 (6 May 1980) [hereinafter "Phase II Rule"], *reprinted in* 45 Fed. Reg. 31622, 31623 (13 May 1980), and Veto Report, *supra*, at 21.

The second goal was simply to shield high-priority users, such as residential gas consumers, from large and sudden price increases resulting from deregulation.

[11] 15 U.S.C. § 3341 (Supp. III 1979).

[12] *Id.* § 3342(a)(1).

[13] *Id.* § 3342(a)(2).

[14] *Id.* § 3342(c)(1).

least be loosened and that the dual gas market—in which the price of federally regulated interstate gas was lower than the price of intrastate gas, which was not subject to federal regulation—should be eliminated. But questions of specific tactics and timing were hotly disputed, with the primary debate centering on proposals for price deregulation. Two major concerns were the effect of deregulation on consumers and the problem of moving from a regulated to a degregulated market. Incremental pricing was proposed as a solution to both problems. President Carter's natural gas proposal and both the original bills passed in the House and the Senate contained provisions for incremental pricing.

In the House a special ad hoc energy committee reported out an energy bill rejecting natural gas deregulation and extending price regulation to intrastate gas, but raising the allowable price of gas by a substantial margin. The bill included a broad provision applying incremental pricing to interstate and intrastate pipelines and to local distribution companies. This meant that FERC would set both the price charged by pipelines to distribution companies and the price charged by distribution companies to local gas users.[15] On 3 August 1977 the committee bill prevailed by a vote of 239-180.[16] The bill did not provide for a legislative veto of FERC's incremental pricing regulations.

In the Senate the President's bill was reported out of committee without recommendation. A substitute bill calling for deregulation ultimately prevailed on 4 October 1977 by a 50-46 vote.[17] This bill applied incremental pricing only to charges by interstate pipelines to distribution companies, rather than also covering intrastate

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[15] H.R. 8444, 95th Cong., 1st Sess. § 410, 123 CONG. REC. 26169 (1977).

[16] 123 CONG. REC. 27242 (1977).

[17] *Id.* at 32306.

pipeline sales and sales from distribution companies to low-priority intrastate industrial users.[18] Like the House bill, the Senate bill did not provide for legislative review of any incremental pricing rule.

The two bills went to conference. It took the conference committee ten months to agree on a compromise bill calling for phased decontrol of natural gas pricing, along with a two-phase incremental pricing program which applied only to sales by interstate pipelines to distribution companies. The conference bill proved extremely controversial in both houses. After days of intense debate, the Senate passed the bill on 27 September 1978 by a vote of 57-42.[19] The House ultimately considered all five energy bills, including the natural gas bill, in a single vote. The clear purpose of this unusual decision to consider five bills at once was to prevent certain defeat of the NGPA. The motion to suspend the rules to allow joint consideration was passed, after extremely bitter debate, on 13 October 1977 by a vote of 207-206.[20] The House then approved the energy package on 14 October 1978 by a vote of 231-168.[21] The bills were signed into law by the President on 9 November 1978.[22]

C. *FERC's Incremental Pricing Rules*

As required, the Commission promulgated Phase I regulations applying incremental pricing to large industries

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[18] H.R. 5289, 95th Cong., 1st Sess. § 29, 123 CONG. REC. 32308 (1977).

[19] 124 CONG. REC. 31847 (1978).

[20] *Id.* at 36975.

[21] *Id.* at 38503.

[22] Remarks on Signing H.R. 4018, H.R. 5263, H.R. 5037, H.R. 5146, and H.R. 5289 into Law, 14 WEEKLY COMP. PRES. DOC. 1978 (9 Nov. 1978).

using natural gas as boiler fuel. The regulations were issued on 28 September 1979, and became effective 1 January 1980.[23]

On 15 November 1979 the Commission issued a notice of proposed rulemaking providing for a broad Phase II rule that applied incremental pricing to all industrial users not specifically exempted by statute.[24] On 6 May 1980, three days before the statutory deadline, the Commission adopted Phase II regulations based on its original November 1979 notice. During public hearings FERC had received many comments urging that incremental pricing not be expanded at all because market conditions had changed and because the incremental pricing concept itself was flawed. FERC rejected these suggestions:

> The Commission believes that it was neither requested nor authorized to second-guess the social and economic judgments that the Congress made in enacting Title II. The role of the Commission under Section 202 is more limited. . . . It is up to the Congress to decide whether this Phase II submittal meets adequately the social and economic goals of the incremental pricing program or, indeed, whether those goals are still appropriate.
>
> By virtue of the very review procedures built into section 202, it seems clear that the Congress sought to have this Commission develop a meaningful Phase II rule. The Congress would not have a meaningful

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[23] FERC Order No. 49, 44 Fed. Reg. 57726 (5 Oct. 1979) (codified in 18 C.F.R. §§ 154, 201, 204, 282 (1980)).

[24] Notice of Proposed Rulemaking and Public Hearings, FERC Docket No. RM 80-10, 44 Fed. Reg. 67170 (23 Nov. 1979).

choice if the Commission were to offer no rule, or a very narrow rule, for its review. . . .

The Commission believes that this Phase II rule presents a meaningful choice to the Congress.[25]

D. *The House Veto*

The House Committee on Interstate and Foreign Commerce conducted hearings on the Phase II rule on 3 April and 6 May 1980. On 6 May, the same day FERC issued the final rule, the Subcommittee on Energy and Power reported favorably on a resolution of disapproval, and the next day the full committee did the same.[26] The committee defined its task as determining "whether the risk of economic dislocation in requiring certain industrial customers at this time to shoulder increased gas costs is outweighed by the benefits in sheltering higher priority users from some cost increases and whether an expansion of incremental pricing at this time is consistent with current national priorities."[27] In recommending disapproval of the rule, the committee emphasized that energy market conditions had changed drastically and in unanticipated ways since passage of the NGPA.[28] Furthermore, uncertainty about the value of incremental pricing remained because there had not yet been sufficient time to evaluate the effects of Phase I.[29] "Accordingly, the committee finds that current uncertainties with respect to phase II of incremental pricing must be sub-

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[25] Phase II Rule, *supra* note 10, at 5, *reprinted in* Veto Report, *supra* note 9, at 19.

[26] Veto Report, *supra* note 9, at 5.

[27] *Id.* at 7.

[28] *Id.* at 8.

[29] *Id.*

stantially reduced before it would consider implementation of a phase II rule." [30]

During the floor debate several reasons were given in support of the veto resolution. Most supporters declared that FERC had acted within its statutory mandate, but that changed circumstances and uncertainty about incremental pricing dictated that Congress drop the Phase II approach.[31] Most congressmen appeared to agree with Representative Sharp's view that the congressional veto provision in section 202(c) was being used "not as a way to discipline [FERC], but as a way for us, as I think [was] intended by the conferees on the 1978 act, to have a second look at the policy that we could not be certain of[,] that we were not willing to mandate at that time." [32] In addition, representatives who had op-

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[30] *Id.* at 13-14. The committee also addressed the issue "whether section 204(e) of the NGPA requires that the Commission set a facility's maximum incremental pricing liability on the basis of its actual alternative fuel cost or whether, instead, section 204(e) merely gives the Commission a range of prices for establishing that facility's maximum incremental pricing liability." *Id.* at 10. The committee concluded: "The Commission's narrow interpretation of its authority under section 204(e) to set incremental pricing alternative fuel ceilings solely on the basis of installed alternative fuel capability and its perceived inability to tie delivered natural gas prices to natural gas wellhead market conditions appears to be a misreading of the statute." *Id.* at 11.

[31] *See, e.g.*, 126 CONG. REC. H3839 (daily ed. 20 May 1980) (remarks of Rep. Sharp); *id.* at H3840 (remarks of Rep. Dingell); *id.* at H3843 (remarks of Rep. Preyer); *id.* at H3844 (remarks of Rep. Lundine); *id.* at H3850 (remarks of Rep. Kemp); *id.* at H3853 (remarks of Rep. Benjamin); *id.* at H3854 (remarks of Rep. Ashley). CECA and Congressional amici agree that the veto was based primarily on the determination that incremental pricing should not be expanded. *See* Brief for Congressional Amici at 47 n.44; Reply Brief for Petitioners at 29.

[32] 126 CONG. REC. H3841 (daily ed. 20 May 1980) (remarks of Rep. Sharp); *see id.* at H3849-50 (remarks of Rep. Levitas); *id.* at H3850 (remarks of Rep. Eckhardt).

posed incremental pricing in 1978 argued for repeal of Phase I and declared their support for the veto because incremental pricing was unwise as a matter of policy.[33] Other supporters of the resolution argued that FERC had violated the intent of Congress, by promulgating either too narrow a rule[34] or too broad a rule.[35] On 20 May 1980 the veto resolution passed the House by a vote of 369-34.[36]

E. *Rehearing Proceedings before the Commission*

On 5 June 1980 CECA petitioned for rehearing of the 6 May order, seeking elimination of the provision conditioning the rule's effectiveness on the failure of either house to pass a veto resolution within thirty days. The petition expressly challenged the constitutionality of section 202(c). On 1 August 1980 FERC denied the petition. It declined to rule on the constitutionality of the veto, finding "that sound administrative practice requires the presumption of constitutional validity of the statutes entrusted to this Commission for implementation." [37]

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[33] "Every argument that has been made in committee, every argument that has been made on the floor against phase II is equally applicable to phase I." *Id.* at H3848 (remarks of Rep. Gramm); *see id.* at H3843 (remarks of Rep. Preyer); *id.* at H3845 (remarks of Rep. Brown); *id.* at H3851 (remarks of Rep. Kemp); *id.* at H3853 (remarks of Rep. Quayle).

[34] *See id.* at H3847 (remarks of Rep. Markey). *See also* Veto Report, *supra* note 9, at 11 ("The Commission's narrow interpretation of its authority under section 204(e) . . . appears to be a misreading of the statute.").

[35] *See* 126 CONG. REC. H3849 (daily ed. 20 May 1980) (remarks of Rep. Stockman); *id.* at H3854 (remarks of Rep. Ashley).

[36] H.R. Res. 655, 96th Cong., 2d Sess., 126 CONG. REC. H3855 (daily ed. 20 May 1980).

[37] Revocation Order, *supra* note 5, at 3, *reprinted* in App. A at 9.

The Commission then revoked the vetoed Phase II rule. It reasoned that if section 202(c) were declared unconstitutional the rule might take effect. This result was undesirable because "the Commission has not yet independently evaluated whether the Phase II rule meets the social and economic goals of the Title II incremental pricing program" and because "we might well have very serious reservations as to the wisdom of making the Phase II rule effective." [38] Therefore, to ensure that it would have an opportunity to evaluate Phase I and Phase II if section 202(c) were held invalid, the Commission decided to "exercise its authority under sections 201 and 202 to amend the rule under section 201 to revoke the amendments made by [the Phase II order]." [39]

Petitioners then sought rehearing of the revocation order. They challenged the Commission's authority to revoke the rule, and argued that the order was issued in violation of the APA's notice and comment requirements. The Commission denied the petition, finding that sections 201 and 202 of the NGPA permitted revocation by giving it power to amend the rule. It also found that the APA's requirements were met by the original notice of November 1979, and ruled in the alternative that there was "good cause" to ignore the APA in this case.[40]

Petitioners sought judicial review of both the revocation order and the denial of the second rehearing petition, and this court consolidated the two petitions. We find that the revocation order was invalid, that section 202(c) is unconstitutional, and that the Phase II rule should become effective absent further Commission action to postpone or amend it. The Commission is free to con-

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[38] *Id.* at 4-5, *reprinted in* App. A at 10-11.

[39] *Id.* at 7, *reprinted in* App. A at 13.

[40] FERC Order Denying Rehearing on Revocation of Amendments in Order No. 80, at 2-3 (2 Oct. 1980) [hereinafter "Second Denial of Rehearing"], *reprinted in* 45 Fed. Reg. 71780 (30 Oct. 1980), and App. A at 22-23.

duct further proceedings not inconsistent with this opinion.

## II. JURISDICTION

Only Congressional amici contest this court's jurisdiction. Their motion to dismiss, opposed by both petitioners and respondent FERC, asserts that this case should have been brought in the district court rather than the court of appeals. We hold that this case is properly in this court, and we deny the motion.

Section 506 of the NGPA gives this court jurisdiction to review FERC orders and rules issued under the Act.[41] Congressional amici insist, however, that petitioners do not seek review of either an order or a rule:

> They instead challenge FERC's acknowledgement that by operation of law its proposed rule is not effective. In essence, petitioners seek to compel FERC to adopt the incremental pricing rule which the House of Representatives has rejected. The decision of an agency not to adopt a rule can be challenged only by an action for mandamus and similar means in the district court, not this Court, and this petition for review should be dismissed.[42]

Congressional amici also contend that this case belongs in the district court because that court is better equipped to compile a record and accord effective relief. We are unpersuaded by either of these arguments.

The suggestion that challenges to an agency's refusal to adopt rules or conduct a rulemaking may be brought only in a district court is erroneous. In *WWHT, Inc.* v. *FCC*[43] we found that this court had jurisdiction to review an allegation "that the FCC abused its discretion

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[41] 15 U.S.C. § 3416 (Supp. III 1979).

[42] Motion of Congressional Amici to Dismiss for Lack of Jurisdiction at 3.

[43] 656 F.2d 807 (D.C. Cir. 1981).

when it denied [a] request for rulemaking."[44] Thus even if we analogized CECA's complaint here to a challenge to an agency refusal to conduct a rulemaking, we still would have no reason for finding a lack of jurisdiction.

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[44] *Id.* at 815-16. *See also National Organization For Reform of Marijuana Laws* v. *Ingersoll*, 497 F.2d 654, 656 n.3 (D.C. Cir. 1974) (denying petition for mandamus, but ordering that petition be considered as one for review, where petitioners challenge agency decision not to conduct rulemaking); *Gage* v. *United States Atomic Energy Comm'n*, 479 F.2d 1214, 1222 n.27 (D.C. Cir. 1973) (Commission denial of petition for institution of a rulemaking proceeding "would constitute a final order reviewable by this court"). The specific holding in *WWHT* was that this allegation of abuse of discretion was cognizable under the APA, 5 U.S.C. § 706(2) (1976). Review was appropriate in the court of appeals because Congress so provided by statute. *See* 47 U.S.C. § 402(a) (1976); 28 U.S.C. § 2342(1) (1976).

Whether review belongs in the district court or court of appeals, then, is determined by reference to the jurisdictional provisions in the agency's governing statute. This points up the flaw in Congressional amici's reliance on *Environmental Defense Fund* v. *EPA*, 598 F.2d 62 (D.C. Cir. 1978), which held that only the district court had jurisdiction over the contention "that EPA should have engaged in an additional rulemaking proceeding." *Id.* at 91. This was based on a finding that the jurisdictional provisions of the statute at issue, the Federal Water Pollution Control Act, 33 U.S.C. §§ 1365(a), 1369(b) (1976), did not provide for review in the court of appeals of this type of agency action. The case does not stand for a general proposition that all denials of rulemaking petitions must be challenged in the district court. (Congressional amici also cite *Natural Res. Defense Council, Inc.* v. *SEC*, 606 F.2d 1031 (D.C. Cir. 1979), in which it was noted that the court earlier had dismissed a petition for review of an agency's refusal to propose rules "on the ground that the Commission's action was not final agency action subject to judicial review." *Id.* at 1037 n.2. The court's reasoning is not clear since the decision was issued without opinion, and in any event such unpublished orders may not be cited as precedent. D.C. CIR. R. 8(f).)

It is clear, moreover, that petitioners do indeed seek review of both a rule and an order of the Commission. CECA raises constitutional challenges to the Phase II rule and statutory challenges to the Commission's decision to revoke the rule. FERC issued a final rule, the effectiveness of which was conditioned on the failure of either house of Congress to veto it. CECA petitioned for removal of that provision, but FERC refused. The rule remained a final agency rule, which CECA challenged on constitutional grounds. FERC then revoked the rule, an action which was "final in every sense of the word." [45]

We also reject the suggestion that the district court is in any way a more appropriate forum in this case. The rulemaking here has been completed. No further compilation of a record is necessary; the issues raised are purely legal and have been fully briefed on all sides. This court is competent to grant whatever relief might be necessary. The simple fact that petitioners desire a different outcome does not turn their claim into one for mandamus.

In sum, there is no reason in law or policy for this case to be brought in the district court.[46] To accept Congres-

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[45] Response of FERC in Opposition to Motion to Dismiss at 5 n.1.

[46] Congressional amici cite two statutes which expressly provide that agency refusals to implement a rule because of a congressional veto must be challenged in the district court. *See* 15 U.S.C.A. § 57a-1(f) (West Supp. 1981) (FTC rulemaking); Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1980, Pub. L. No. 96-539, § 4, 94 Stat. 3195 (to be codified at 7 U.S.C. § 136w(4)) (EPA pesticide rulemaking). These statutes are irrelevant here, however, since Congress did not authorize the district court to hear such issues in FERC cases. Indeed, by directing the district court to certify to the court of appeals all questions of the constitutionality of the legislative veto, these provisions suggest that Congress intends, even where it directs suits to be brought in the district court, to have a court of appeals, rather than a single district court judge, ruling on the constitutionality of the legislative veto.

sional amici's interpretation would be to create a standard whereby review of rules would be heard in one court and review of revocation of rules in another, even though the statute, record, and issues would be virtually identical. We decline to reach such a result because it would violate the congressional intent expressed in section 506 that review of final Commission decisions be conducted in the courts of appeals.[47]

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[47] In *Chadha* v. *Immigration & Naturalization Serv.*, 634 F.2d 408 (9th Cir 1980), *consideration of juris. postponed until hearing on merits*, 102 S. Ct. 87 (1981), the Ninth Circuit held that it had jurisdiction to review the House of Representatives' disapproval of the suspension of an alien's deportation. This was based on 8 U.S.C. § 1105a(a) (1976), which provides that review in the court of appeals "shall be the sole and exclusive procedure for the judicial review of all final orders of deportation." Congressional amici direct our attention to a recent Third Circuit decision interpreting the same jurisdictional provision, though not involving the legislative veto. The court found that it lacked jurisdiction to hear claims brought by non-immigrant Iranian students found deportable by the Immigration and Naturalization Service ("INS"), challenging the constitutionality of the regulation which led to the discovery of their illegal status. Discussing the holding in *Chadha*, the Third Circuit declared:

> A faithful application of *Cheng Fan Kwock* [v. *INS*, 392 U.S. 206 (1968),] compels the conclusion that, because the constitutionality of either the one-house disapproval or the Iranian-related regulation could not have been tested during administrative deportation proceedings, neither matter should be reviewable directly by a court of appeals under section 106(a).

*Dastmalchi* v. *Immigration & Naturalization Serv.*, 660 F.2d 880, 888 (3d Cir. 1981).

We find neither of these cases relevant to the jurisdictional question before us. There is a considerable body of law interpreting the specific judicial review provisions of the Immigration and Naturalization Act, centering on the meaning of "all final orders of deportation." In contrast, this case presents us with the more general issue of appellate review of a final agency rule. In particular, we note that the specific

## III. Severability

FERC, joined by Congressional amici and intervenors, argues that this court should not reach the constitutional issues because even if we found the legislative veto provision unconstitutional, petitioners would not be entitled to effective relief. The argument is that section 202(c) is inseverable from section 202(a) because Congress would not have authorized Phase II incremental pricing had the legislative veto provision not been included. Thus, if subsection (c) is unconstitutional all of section 202 must be struck down. FERC would be left without authority to promulgate any Phase II rule, and petitioners would not be entitled to reinstatement of the rule issued by FERC in May 1980.

Petitioners deny that section 202(c) is inseverable from the rest of section 202, but they go on to argue that if section 202 must stand or fall as one, then section 202 is inseverable from the rest of Title II, which in turn is inseverable from the NGPA. Striking down the entire NGPA arguably would provide petitioners with effective relief because it would reinstate the pre-existing stringent natural gas price control scheme. FERC denies that section 202 is inseverable from the remainder of the NGPA, arguing that Phase I and Title I could go into effect without change. Gas Con-

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ground of disagreement stated by the Third Circuit was that the constitutionality of the legislative veto and the INS regulation could not have been determined during the administrative deportation proceedings. In this case, FERC refused to address the constitutional issue because it did not want to take a partisan position, not because it lacked the power to do so. *See* note 5 *supra*. Congressional amici do not claim otherwise. Thus, we are presented with a case in which the agency refused on policy grounds to address the issue, and then, in recognition of the importance of the issue, went on to revoke the rule. For us to refuse to review the constitutional issue would be tantamount to holding that a court of appeals may never decide constitutional challenges to any agency rule.

sumers, on the other hand, agree that section 202 is inseverable from section 201, but contend that Title I may stand alone. We do not need to reach these secondary arguments, however, because we find that subsection (c) is severable from the remainder of section 202.[48]

The presence of a severability clause, which expressly sets forth congressional intent that a statute stand in the event one of its provisions is struck down, makes it extremely difficult for a party to demonstrate inseverability.[49] When there is no such clause, however, as in this case, the test is less certain. Petitioners argue that severability is presumed and that the proponents of inseverability must prove otherwise. This standard is derived from *Tilton* v. *Richardson*,[50] which stated that

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[48] The parties appear confused as to whether the severability issue presents a question of standing or of mootness. *Compare, e.g.*, Brief for Gas Suppliers at 13 (inseverability means petitioners lack standing), *with id.* at 2 (inseverability means case is moot). Since we find that subsection (c) is severable, we need not decide this question. We also need not decide whether severability presents a *threshold* question that must be resolved prior to a determination on the merits. *Compare McCorkle* v. *United States*, 559 F.2d 1258, 1261-62 (4th Cir. 1977) (refusing to determine constitutionality of legislative veto provision in Federal Salary Act because provision is inseverable from remainder of Act), *cert. denied*, 434 U.S. 1011 (1978), *with Atkins* v. *United States*, 556 F.2d 1028, 1057-71 (Ct. Cl. 1977) (per curiam) (holding legislative veto provision in Federal Salary Act constitutional, without deciding severability issue), *cert. denied*, 434 U.S. 1009 (1978), and *id.* at 1082 n.16 (Shelton, J., concurring in part and dissenting in part) ("It is, of course, unnecessary for the majority to reach the question of severability since it holds the one-House veto to be constitutional.").

[49] *See, e.g., Electric Bond & Share Co. v. SEC*, 303 U.S. 419, 434 (1938); *Chadha* v. *Immigration & Naturalization Serv.*, 634 F.2d 408, 415-16 & n.3 (9th Cir. 1980), *consideration of juris. postponed until hearing on merits*, 102 S. Ct. 87 (1981).

[50] 403 U.S. 672, 684 (1971) (plurality opinion) (quoting *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)).

" '[t]he cardinal principle of statutory construction is to save and not to destroy,' " and from *Buckley* v. *Valeo*,[51] which held: " 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " Congressional amici and intervenors, on the other hand, contend that petitioners are required to overcome a presumption that section 202(c) is inseverable from section 202 as a whole. They cite the Supreme Court's statement in *Carter* v. *Carter Coal Co.*[52]:

> In the absence of [a severability] provision, the presumption is that the legislature intends an act to be effective as an entirety—that is to say, the rule is against mutilation of a statute; and if any provision be unconstitutional, the presumption is that the remaining provisions fall with it.[53]

We think the question where the presumption lies is mostly irrelevant, and serves only to obscure the crucial inquiry whether Congress would have enacted other portions of the statute in the absence of the invalidated provision. This is fully in accord with *United States* v. *Jackson*,[54] in which the Supreme Court refused to place significance on the absence of a severability clause: "[W]hatever relevance such an explicit clause might have in creating a presumption of severability, . . . the ultimate determination of severability will rarely turn on the presence or absence of such a clause." Rather, the

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[51] 424 U.S. 1, 108 (1976) (per curiam) (quoting *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932)).

[52] 298 U.S. 238, 312 (1936).

[53] *See also Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 434 (1938) (severability clause "reverses the presumption of inseparability").

[54] 390 U.S. 570, 585 n.27 (1968).

question is whether Congress would have enacted the remainder of the statute without the unconstitutional provision.[55] We do not view the imposition of any unspecified burden of persuasion on either side as beneficial to the inquiry.

We are presented with two remarkably different interpretations of the legislative history and intent underlying section 202. Petitioners contend that incremental pricing was critical to the compromise that enabled the NGPA to pass. They point out that the legislative review provision was added only in conference, that the provision was not emphasized in either the conference report or the subsequent floor debates, and that a major concern of many congressmen was that broad price protection be provided for consumers. Respondent and its supporters, on the other hand, claim that the legislative veto provision was central to the compromise that divided incremental pricing into two stages. They point to assurances made during the congressional debates that Phase II did not have to go into effect, and contend that without the veto provision Phase II incremental pricing would not have been authorized.

Though the legislative history, as almost always is the case, contains contradictory comments about the importance of section 202 and subsection (c), we find that Congress would have enacted section 202 in the absence of the legislative review provision in subsection (c). At the outset, we reject intervenors' view that the conference report in any way "emphasized" that section 202 would not have been enacted without subsection (c). The report simply describes the working of that section,

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[55] *See, e.g., Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (per curiam); *United States* v. *Jackson*, 390 U.S. 570, 585 (1968). *See also Atkins* v. *United States*, 556 F.2d 1028, 1083-85 (Ct. Cl. 1977) (Shelton, J., concurring in part and dissenting in part) (although presumption of severability was mentioned in early cases, present law is clear that there is no presumption), *cert. denied*, 434 U.S. 1009 (1978).

and thus states that the Phase II rule will go into effect only if neither house disapproves.[56] No one disputes that this was the *intent* of section 202 as enacted. The question before us, however, is what Congress *would have intended* in the absence of section 202(c). On this question the conference report is silent. To the extent the report does aid the inquiry, it supports petitioners' argument for severability, as its summary of Title II fails to mention, much less emphasize the importance of, the legislative review provision in section 202.[57] Combined with the fact that none of the incremental pricing provisions in earlier bills were made subject to congressional review, this lack of emphasis militates against the view that the veto provision was essential to the incremental pricing and NGPA compromises.

The floor debate on the conference committee compromise reinforces our finding of severability. It is true that there were statements on the floor of each house explaining that Phase II could be rejected by legislative veto. In response to criticisms of incremental pricing, Senator Jackson noted that "this bill does not compel incremental pricing with respect to any industrial use other than in large boilers. Extension of incremental pricing beyond boiler use could be prevented by a majority vote of either House of Congress 2 years from now." [58] In the House, Representative Dingell noted that the intent was not to "drive industrial users off natural gas and onto other fuels," and went on to describe "several statutory guarantees against such an unintended result," one of which was that "[a]ny broadening of incremental pricing to a broader universe of industrial users is subject to congressional review and single House veto." [59]

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[56] Conference Report, *supra* note 9, at 95-97.

[57] *Id.* at 68-69.

[58] 124 CONG. REC. 31821 (1978) (remarks of Sen. Jackson).

[59] *Id.* at 38362 (remarks of Rep. Dingell).

Considered in isolation, these two statements tend to support respondent's view that section 202(c) was essential to the statutory scheme. But other remarks by these same congressmen indicate their belief that Phase II was more than a mere possibility, it was a desirable policy. Senator Jackson's primary response to concerns about the potential ill-effects of incremental pricing was not to point out that a Phase II rule could be vetoed, but to argue that it would succeed because it would not cause gas prices to rise higher than alternative fuel prices.[60] Representative Dingell made the same point, and then went on to argue that "a broadening of incremental pricing to other industrial users will give added assurances against forced conversions."[61] He thus saw Phase II as important in ensuring the overall success of incremental pricing.

More important, these two statements are the sole references to subsection 202(c) during the days of debate which focused quite extensively on incremental pricing. These debates leave absolutely no doubt that the controversy over incremental pricing did not hinge on whether it would be limited to boiler uses or extended to other industrial uses. Opponents of the Act's incremental pricing provisions stressed primarily the regional discrimination that would result from applying it only to interstate pipelines,[62] although some attacked the con-

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[60] *Id.* at 31821 (remarks of Sen. Jackson); *see id.* at 31843 (remarks of Sen. Jackson).

[61] *Id.* at 38362 (remarks of Rep. Dingell).

[62] "Incremental pricing is imposed upon industrial users only in the interstate market. Thus, gas will be cheaper for industries in the producing States, further encouraging the flight of industries from the Northeast and Midwest to the Sunbelt." *Id.* at 38480 (remarks of Rep. Markey); *see, e.g., id.* at 38499 (remarks of Rep. Holt); *id.* at 38497 (remarks of Rep. Pressler); *id.* at 38396 (remarks of Rep. Gore); *id.* at 38391 (remarks of Rep. Coughlin); *id.* at 38376 (remarks of Rep. Stockman); *id.* at 38372 (remarks of Rep.

cept itself.[63] And the most pervasive defense of Title II was that it would provide strong protection against large price increases for residential consumers.[64] Nothing in these dozens of remarks remotely indicates that these proconsumer arguments would have changed into opposing arguments had Phase II not been made subject to legislative review.[65]

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Edwards); *id.* at 38353 (remarks of Rep. Horton); *id.* at 38353 (remarks of Rep. Moffett); *id.* at 38353 (remarks of Rep. Anderson); *id.* at 38482 (remarks of Rep. Brown); *id.* at 38126 (remarks of Sen. Hollings); *id.* at 30025 (remarks of Sen. Humphrey); *id.* at 30024 (remarks of Sen. Metzenbaum); *id.* at 30022 (remarks of Sen. Kennedy); *id.* at 30016 (remarks of Sen. Abourezk); *id.* at 28888 (remarks of Sen. Wallop); *id.* at 28876 (remarks of Sen. Weicker); *id.* at 28644 (remarks of Sen. Hansen).

[63] *See, e.g., id.* at 38376 (remarks of Rep. Stockman); *id.* at 38372 (remarks of Rep. Edwards); *id.* at 28644 (remarks of Sen. Hansen).

[64] "[This bill] reverses the historical unfairness in pricing between residential and industrial users. . . . Under the report, extra costs would be passed on to the industrial users." *Id.* at 31844 (remarks of Sen. Glenn); *see, e.g., id.* at 38498 (remarks of Rep. Wolff); *id.* at 38381 (remarks of Rep. Glickman); *id.* at 38361 (remarks of Rep. Dingell); *id.* at 31844-46 (remarks of Sen. Glenn); *id.* at 28633, 31818, 31842-43 (remarks of Sen. Jackson); *id.* at 31840-41 (remarks of Sen. Muskie); *id.* at 31838 (remarks of Sen. Moynihan); *id.* at 31835 (remarks of Sen. DeConcini); *id.* at 31817 (remarks of Sen. Bumpers); *id.* at 30026 (remarks of Sen. Chiles); *id.* at 30024 (remarks of Sen. Heinz); *id.* at 28665 (remarks of Sen. Pearson).

[65] To the contrary, it is noteworthy that Phase I was estimated to cover only 10% of interstate gas deliveries. *See id.* at 38362 (remarks of Rep. Dingell). Although the market ordering purpose conceivably might be served by Phase I alone, *see id.*, broad consumer protection could not be provided by this limited coverage. Indeed, FERC subsequently found that the actual coverage of Phase I was only 7-8% of annual interstate volumes, *see* Phase II Rule, *supra* note 10, at 16, *reprinted in* Veto Report, *supra* note 9, at 25, and it concluded

We are convinced, then, that Congress would have enacted both phases of incremental pricing without the veto provision. Title II of the NGPA set forth a congressional policy in favor of incremental pricing.[66] Although the exact contours were left in doubt, the Congress made, through its delegation to FERC, at least a tentative decision in favor of extension of incremental pricing to nonboiler industrial uses. By finding the veto provision severable we do not destroy the distinction Congress made between Phase I and Phase II. The scope of Phase I was unambiguous, and the Commission was left with mostly technical discretion to formulate a workable rule. Phase II, however, was undefined; the Com-

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that "the objective of price shielding can be best advanced by a Phase II rule covering as broad a class of non-exempt users as possible." *Id.* at 70, *reprinted in* Veto Report, *supra*, at 49.

[66] The nature of the House's consideration of the disapproval resolution also indicates a recognition that incremental pricing generally was critical. The House Report recommending disapproval noted that "the incremental pricing concept was perceived to be a necessary prerequisite to increased wellhead prices for natural gas." Veto Report, *supra* note 9, at 6. And Representative Dingell began the hearings on the rule by stating: "Incremental pricing is one of the very important elements of the compromise that was forged during the 95th Congress which resulted in the enactment of the Natural Gas Policy Act." *Phase II Incremental Pricing of Natural Gas: Hearings on H.R. Res. 655 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. 1 (3 Apr. & 6 May 1980) [hereinafter "*Phase II Hearings*"] (statement of Rep. Dingell). During the hearings and debates, almost everyone indicated a belief that by considering a veto of the rule the House was engaging in a policy reassessment. The discussion focused almost exclusively on whether incremental pricing remained appropriate policy, especially in light of new market conditions. Representative Gramm noted that "every point for vetoing phase II is an equally good point for vetoing phase I." *Id.* at 381 (statement of Rep. Gramm). *See generally* p. 14 *supra*.

mission was directed only to come up with *some* extension of incremental pricing. The concerns about extending incremental pricing, especially the possibility that gas users would be forced to switch to other fuels, were left open for the Commission to consider.[67] To some extent the Commission did exercise such discretion, as it set a moderate alternative fuel price level so that its extension of incremental pricing would not place great burdens on the uses to be covered by Phase II.[68] Moreover, the Commission's stated reason for not considering a more limited Phase II rule was that it thought the veto provision left that determination to Congress.[69] If the legislative veto had not been enacted, the scope of the Phase II rule would have been left to the Commission's discretion, which would include consideration of the effect of changed market conditions on the usefulness of incre-

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[67] *See, e.g.*, 126 CONG REC. H3854 (daily ed. 20 May 1980) (remarks of Rep. Ashley):

> In my role as a conferee on the NGPA, I had occasion to engage in a colloquy with my colleague JOHN DINGELL during floor consideration of the bill. That colloquy made clear the conferees' understanding that a significant delegation of authority was being made to FERC under NGPA, with respect to phase II of incremental pricing. But the remarks also made very clear the intent of Congress that FERC exercise this authority cautiously, and that the Commission carefully consider the economic impact of incremental pricing in all industrial users (especially industrial process users) before promulgating a final rule.

[68] *See* Phase II Rule, *supra* note 10, at 70-71, *reprinted in* Veto Report, *supra* note 9, at 49.

[69] *See id.* at 5, *reprinted in* Veto Report, *supra* note 9, at 19; *Phase II Hearings*, *supra* note 66, at 383 ("I believe that the Congress cannot have it both ways. It cannot reserve [the judgment on the propriety of Phase II incremental pricing] to itself through the veto authority and then assert that it should have been exercised independently by the agency, free from congressional review or, more importantly, responsibility") (statement of FERC Chairman Curtis).

mental pricing. The distinction between Phase I and Phase II thus would have been preserved, and the same basic policy underlying Title II would have been enacted. The veto provision was not essential to the statutory policy, and it thus is severable.[70]

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[70] In *McCorkle* v. *United States*, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978), the Fourth Circuit refused to decide a constitutional challenge to the legislative veto provision in the Federal Salary Act on the ground that the provision was inseverable from the grant of power enabling the President to propose salary increases. The Court found:

> Voiding the one-house veto as unconstitutional while leaving presidential authority intact would increase the President's power over salaries far beyond the intention of Congress. We are satisfied that the legislative history establishes that Congress would not have delegated authority to the President to establish salaries without the provision for the one-house veto.

*Id.* at 1262. We think this holding is easily distinguishable from our finding of severability in this case. The Fourth Circuit found that the legislative history was clear that Congress would not have given the President blanket authority to set federal salaries without imposing a check. Here, in contrast, the delegation of rulemaking authority to FERC was entirely routine: it was required to issue a rule on a specifically defined subject, and to do so pursuant to normal administrative procedures. Such delegations are commonly made without any provision for legislative review, and we see nothing in the legislative history to indicate that Congress would have done differently in this case.

*McCorkle* also stated that "the case against severance is strong" where the provision restricts a grant of power: "Otherwise, the scope of the power would be enlarged beyond the legislature's intent." *Id.* at 1261. We decline to adopt this as a general principle that would make all veto provisions prima facie inseverable. We think this statement does no more than restate the basic test that a court should determine whether the provision was so essential to the legislative purpose that the statute would not have been enacted without it. In *McCorkle* the restriction seemed essential to the Fourth Circuit, as the grant of power otherwise would have been

## IV. Mootness

FERC contends that its revocation order renders this case moot because there no longer is a rule for petitioners to challenge. Petitioners make two responses. First, they assert that FERC was not authorized to revoke the rule. Second, they contend that even if FERC had power to revoke the rule, the revocation order was invalid because FERC did not comply with the notice and comment requirements of the APA. FERC replies that it has revocation authority under sections 201(a) and 202 of the NGPA, that the original Phase II notice and opportunity to comment encompassed this revocation order as well, and that in any event this order fell within the "good cause" exception to the notice and comment requirements. We find that FERC's revocation order is invalid because it was issued in violation of the APA, and thus do not reach the issue whether FERC was authorized to revoke the rule.

FERC makes two arguments why it was not required to provide notice and comment prior to revoking the Phase II rule.[71] First, it argues that the November 1979

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much larger than Congress would have contemplated; in *Chadha*, on the other hand, the veto provision, although a restriction on a grant of power, was deemed not essential and therefore severable. *See Chadha* v. *Immigration & Naturalization Serv.*, 634 F.2d 408, 417 & n.5 (9th Cir. 1980), *consideration of juris. postponed until hearing on merits*, 102 S. Ct. 87 (1981).

[71] Intervenors raise an additional ground not relied on by FERC. They assert that § 506 of the NGPA provides specific authorization for FERC to repeal its rule without any further notice or comment. Section 506(a)(3) provides: "At any time before the filing of the record of a proceeding in a United States Court of Appeals . . . the Commission may, after providing notice it determines reasonable and proper, modify or set aside, in whole or in part, any order issued under the provisions of this chapter." 15 U.S.C. § 3416(a)(3) (Supp. III 1979). Intervenors contend that this provision permitted the revocation order, since the Commission implicitly found that

notice and opportunity to comment provided prior to promulgation of the Phase II rule was sufficient to cover the order of revocation. FERC provides no support for this contention, but intervenors expand on it by asserting that petitioners had ample notice originally that one option to be considered by the Commission was to adopt no rule at all, and that this is all the APA requires. We disagree. Sections 553(b) and (c) set forth notice and comment requirements for "rule making," [72] which is de-

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the "reasonable and proper" notice would in this case be no notice. They also find authority for the Commission's action in § 506(a)(2), which provides that upon the filing of a petition for rehearing, the Commission may "grant or deny the requested rehearing or modify the original order without further hearing." *Id.* § 3416(a)(2). Gas Consumers contend that since "the revocation of the proposed Phase II regulations was effected by FERC as the direct and acknowledged result of Petitioners' application for rehearing," FERC was authorized to revoke the rule without providing notice and comment. Brief for Gas Consumers at 47.

We note that FERC has not relied on these provisions as authority for their revocation order, either in response to the two petitions for rehearing or in argument to this court. This provides a strong indication that the agency itself does not view § 506 as providing authority summarily to revoke a disapproved final rule. More important, we are convinced that Congress did not intend § 506(a) to permit the Commission to use the occasion of a petition for rehearing to make any substantive change whatsoever in a rule, without providing some notice and comment. To so interpret the provision would effectively eviscerate the procedural protections provided by the APA, a result clearly not envisioned by the NGPA. We therefore decline to adopt intervenors' argument that the revocation order as carried out was authorized by § 506.

We also note, without deciding, the issue whether § 506(a) applies at all to rulemaking, since § 506(a) deals only with orders while § 506(b) deals with rules. *But cf. ECEE, Inc.* v. *FERC*, 611 F.2d 554, 559-66 (5th Cir. 1980) (holding that rehearing requirement in § 506(a) applies to rulemaking orders issued under § 506(b)).

[72] 5 U.S.C. §§ 553(b), (c) (1976).

fined in section 551(5) to mean "agency process for formulating, amending, or *repealing* a rule." [73] Thus, the APA expressly contemplates that notice and an opportunity to comment will be provided prior to agency decisions to repeal a rule. If the notice and comment provided prior to a rule's promulgation were meant to be sufficient to encompass any later repeal of the rule, simply because there was always a possibility that no rule would be adopted, the statute never would have included repeal of a rule within the definition of rulemaking.[74]

The value of notice and comment prior to repeal of a final rule is that it ensures that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal. Such an opportunity was lacking here. The Commission consistently stated that it had no choice but to issue a broad Phase II rule.[75] The Commission issued a final rule, and petitioners sought to amend the provision making the rule's effectiveness contingent on legislative review. Although the petition for rehearing said nothing about repealing the rule, and no other party requested such action, the Commission went ahead and rescinded it. The specific concerns that motivated this

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[73] *Id.* § 551(5) (emphasis added).

[74] Intervenors, though not FERC, argue that notice and comment were not required because FERC did not "repeal a rule," but rather merely revoked "proposed regulations." They claim that § 553(b) applies only to final rules that are legally enforceable. *See* Brief for Gas Consumers at 52. We reject the view that FERC's Phase II rule was nothing more than a proposed regulation, *see* pp. 74-76 *infra*, but note that in any event the 6 May order was a final rule. The rulemaking process was at that point complete. The fact that the House of Representatives voted its disapproval did not make the rule any less final. The Commission's action in revoking the final rule, therefore, fit squarely within the category of actions subject to the APA's notice and comment requirements.

[75] *See* Notice of Proposed Rulemaking, *supra* note 24, 44 Fed. Reg. at 67170-71; Phase II Rule, *supra* note 10, at 5, *reprinted in* Veto Report, *supra* note 9, at 19.

decision—the constitutionality of the legislative veto and the results that might follow from a judicial decision to strike down the veto—were different from those raised during the original rulemaking. All of these factors demonstrate that notice and comment would have been useful prior to repeal, and thus buttress further our conclusion that the Commission was required to follow section 553.[76]

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[76] *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314 (4th Cir. 1980), cited by intervenors for the proposition that an agency may modify a previous decision in light of a petition for rehearing without providing further notice or opportunity to comment, is inapposite. In modifying a previous order, the FCC adopted a position which was raised by the rehearing petition, which had long been argued before the FCC, and which had been brought up specifically in the preceding rulemaking proceeding; indeed, the Commission noted that there had been a full opportunity to debate this particular issue "in five separate pleading cycles." *Id.* at 321. In contrast, we are presented here with a situation in which the Commission made it known from the outset that it construed its mandate to preclude the possibility of issuing no rule or postponing the issuance of a rule. Moreover, the court in *Spartan Radiocasting* distinguished situations in which notice and comment were necessary to prevent unfairness, observing that "an agency decision which is made in reconsideration of a final order has been overturned for failure to give published notice of the fact of its renewed deliberations. *Arlington Oil Mills, Inc.* v. *Knebel*, 543 F.2d 1092, 1098-99 (5th Cir. 1976)." *Id.*

In *Arlington Oil Mills* the Department of Agriculture announced a decision on peanut support prices on 19 March, then revoked that decision on 6 July and reinstated the preexisting price levels. The Department provided no notice to the public that it was considering rescission of the 19 March order, nor did it solicit comments or conduct hearings. 543 F.2d at 1097. The court of appeals held that "the Secretary was required to provide adequate notice that reconsideration was underway and to give all interested persons a reasonable opportunity to participate and present their views before he arrived at the July 6 announcement." *Id.* at 1099. This is similar to what went on here. CECA's petition raised only the prospect of reconsideration of the provision making the

The Commission's second argument is that additional notice and comment, even if normally required, were not required here because the Commission found, in accordance with the exception contained in section 553(b)(B),[77] that they were "unnecessary" in this case. FERC contends that it acted "to insure that defectively promulgated regulations will not become effective," citing its statements in the revocation order that it had not engaged in an independent determination of the validity of the policies embodied in the Phase II rule.[78] This contention is easily rejected. Section 553(b)'s "good cause" exception requires the agency to state the reasons for finding "good cause" in its decision. Here, however, FERC merely asserted that further notice and opportunity to comment were unnecessary; only later did it argue that they were unnecessary *because* the regulations were defective.[79]

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rule's effectiveness contingent on legislative review. No party had any inkling that the Commission was considering a complete repeal of the rule. This is not a case in which "[a]ny surprise worked upon petitioner arises from the success of the opponent's arguments, rather than from any claimed failure of notice about their consideration." *Spartan Radiocasting*, 619 F.2d at 322. The Commission's decision clearly caught petitioners, indeed all parties, by surprise.

[77] 5 U.S.C. § 553(b)(B) (1976) provides that the requirements of § 553 do not apply "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

[78] Brief for Respondent at 16.

[79] The Commission's entire statement regarding its failure to provide notice and comment is as follows:

> Nor do we believe that the notice and comment procedures of 5 U.S.C. § 553 require another result. Because the Commission provided full notice and opportunity to comment prior to issuing Order No. 80, further comment is unnecessary. Notice of Proposed Rulemaking, 44 *Fed. Reg.* 67170 (November 23, 1979). However, to the extent that 5 U.S.C. § 553 would otherwise require it,

Furthermore, the argument that repeal was required because the regulations were defective does not explain why notice and comment could not be provided. This court has held that "use of these exceptions by administrative agencies should be limited to emergency situations." [80] The fact that FERC considered these regulations defective did not imply that an emergency existed. Were a court to strike down the legislative veto provision in section 202(c), the Commission would be able to assert the same modification and revocation authority it asserted in this case, and thus be able to consider altering the rule. Since no emergency existed, the Commission was not entitled to ignore section 553(b).[81]

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> we find here that for good cause, further notice and public procedure are "unnecessary" in accordance with 5 U.S.C. § 553(b).
>
> Further, regardless of the application of those procedures to regulations which become operative, they cannot be required where regulations are revoked because they have not been fully considered.

Second Denial of Rehearing, *supra* note 40, at 3, *reprinted in* App. A. at 23. It is clear that the Commission considered the question of defective promulgation to be different from the question of "good cause."

The Commission's argument that notice and comment requirements do not apply to "defectively promulgated regulations" is untenable because it would permit an agency to circumvent the requirements of § 553 merely by confessing that the regulations were defective in some respect and asserting that modification or repeal without notice and comment was necessary to correct the situation. Such a holding would ignore the fact that the question whether the regulations are indeed defective is one worthy of notice and an opportunity to comment.

[80] *American Fed'n of Gov't Employees, AFL-CIO* v. *Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

[81] Indeed, given that the Commission never explained why it could not postpone consideration of revocation until after a judicial ruling on the one-house veto, the only result of acceptance of the Commission's argument would be to pre-

## V. Constitutionality of the One-House Veto

Petitioners raise four constitutional challenges to the legislative review provision in section 202(c). They claim that the veto provision violates the constitutional doctrine of separation of powers; that it deprives the President of his veto power under Article I, Section 7 of the Constitution (the Presentment Clause); that it violates Article I, Section 7's requirement of bicameralism; and that it delegates legislative authority without standards or provision for judicial review. FERC, Gas Consumers, and PEG have taken no position on these claims. Congressional amici and Gas Suppliers, however, contest each of these arguments, and assert generally that Congress is authorized to use the one-house veto device under the Necessary and Proper Clause of the Constitution.

We hold that section 202(c) is unconstitutional. The primary basis of this holding is that the one-house veto violates Article I, Section 7, both by preventing the President from exercising his veto power and by permitting legislative action by only one house of Congress. In addition, we find that the one-house veto contravenes the separation of powers principle implicit in Articles I, II, and III because it authorizes the legislature to share powers properly exercised by the other two branches. Because we find these bases sufficient to resolve the issue, we do not reach the undue delegation of powers issue raised by petitioners.[82]

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vent judicial review entirely. FERC justified its revocation on the need to assure that it had "an opportunity to evaluate Phase I, and the impacts of Phase II as proposed[,] in the event section 202(c) is held invalid." Revocation Order, *supra* note 5, at 7, *reprinted in* App. A at 13. Before this court, however, FERC argues not only that revocation was justified because of the possibility of a judicial ruling on the constitutionality of section 202(c), but that the revocation decision itself *prevents* this court from reaching the constitutional issue at all.

[82] The doctrine of undue delegation prohibits standardless delegation of powers from Congress to the Executive or ad-

A. *Federal Rulings on the Legislative Veto*

Although Congress and the Executive have been at odds for decades over the constitutionality of the legislative veto, the Supreme Court has never ruled on the issue.[83] Three federal courts presented with the issue

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ministrative agencies. *See, e.g., A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935). Although the doctrine has seldom been used, and indeed has often been declared deceased, there is evidence that the Supreme Court has not written it off. *See, e.g., National Cable Television Ass'n, Inc.* v. *United States*, 415 U.S. 336, 342 (1974) (construing statute narrowly to avoid delegation doctrine problems); *Industrial Union Dept. AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring in judgment); *California Bankers Ass'n* v. *Schultz*, 416 U.S. 21, 90-91 (1974) (Douglas, J., dissenting); *id.* at 91-93 (Brennan, J., dissenting). Moreover, a growing number of other judges and commentators have urged revival of the doctrine. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST 131-34 (1980); T. LOWI, THE END OF LIBERALISM 146, 154-55, 297-99 (1969); Gewirtz, *The Courts, Congress, and Executive Policy-Making*, LAW & CONTEMP. PROB., Summer 1976, at 46, 49-65; McGOWAN, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1127-30 (1977); Wright, Book Review, 81 YALE L.J. 575, 582-87 (1972). Although we recognize the importance of the concerns about broad delegations, *see* note 172 *infra*, we note that acceptance of petitioners' argument would require us not only to pronounce a revival of the delegation doctrine, but also to extend the doctrine beyond the administrative setting to encompass congressional delegations of power to parts of Congress itself. We do not suggest that the breadth of such a holding necessarily demonstrates its implausibility. *See, e.g.*, Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C.L. REV. 423, 448-51 (1978) (recognizing plausibility of delegation doctrine argument as applied to legislative veto); McGowan, *supra*, 1159-60 (same). But given the sufficiency of the other constitutional claims, we believe consideration of this possibility is neither necessary nor appropriate in this case, especially in light of the short shrift given the argument by petitioners themselves.

[83] One Supreme Court Justice has expressed the view that the legislative veto is constitutional. In a separate opinion

have disposed of the cases without addressing the merits.[84] Two other federal courts, however, have ruled on

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in *Buckley* v. *Valeo*, 424 U.S. 1, 257 (1976) (White, J., concurring in part and dissenting in part), Justice White briefly addressed the constitutionality of a one-house veto provision in the Federal Election Campaign Act of 1971, 2 U.S.C. § 438(c) (1976). First, he likened a one-house veto to disapproval of proposed legislation, meaning that the requirements of Article I, Section 7 do not apply. 424 U.S. at 284-85. Moreover, he argued that the principal purpose of the President's veto power, to provide the Executive Branch "with some bargaining and survival power against what the Framers feared would be the overweening power of legislators," *id.* at 285, is not implicated by review of agency rulemaking, which he considered legislative in nature. He concluded:

> I would be much more concerned if Congress purported to usurp the functions of law enforcement, to control the outcome of particular adjudications, or to pre-empt the President's appointment power; but in the light of history and modern reality, the provision for congressional disapproval of agency regulations does not appear to transgress the constitutional design, at least where the President has agreed to legislation establishing the disapproval procedure or the legislation has been passed over his veto.

*Id.* at 285-86.

The majority in *Buckley* did not address this issue, disposing of the case on other grounds. *Id.* at 140 n. 176 (per curiam).

[84] *See McCorkle* v. *United States*, 559 F.2d 1258 (4th Cir. 1977) (severability), *cert. denied*, 434 U.S. 1011 (1978); *Clark* v. *Valeo*, 559 F.2d 642 (D.C. Cir.) (en banc) (per curiam) (ripeness), *aff'd mem. sub nom. Clark* v. *Kimmitt*, 431 U.S. 950 (1977); *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.*, 420 F. Supp. 162 (S.D. Ala. 1976), *remanded*, 578 F.2d 1149 (5th Cir. 1978), *cert. denied*, 444 U.S. 879 (1979).

Judge MacKinnon's dissenting opinion in *Clark* v. *Valeo* expressed the view that the legislative veto provision at issue, the same one involved in *Buckley* v. *Valeo*, was unconstitutional. His opinion was primarily a response to Justice White's position in *Buckley*, *see* note 83 *supra*, that Article I, Section 7 does not apply because regulations subject to congressional disapproval either become effective by the nonaction of Congress or are disapproved by action that is equivalent to the

the constitutionality of two different legislative review provisions, one provision being struck down and the other being upheld.[85]

In *Atkins* v. *United States*[86] the Court of Claims upheld (4-3) the one-house veto provision of the Federal Salary Act of 1967, under which the President's recom-

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rejection of proposed legislation. Judge MacKinnon's view was that Congress most definitely does "act" when it fails to veto an agency regulation because "it may act affirmatively by a majority vote to approve or the resolution to veto may not carry by the required majority. Either procedure would constitute an *act* or *vote* of approval for that house." 559 F.2d at 687 (MacKinnon, J., dissenting) (emphasis in original). Since Congress "acts" regardless how it votes on the resolution, it clearly engages in legislative action which must conform to the Article I, Section 7 requirements of presentation to the President and passage by both houses of Congress. *See id.* at 685-90. Like Justice White, Judge MacKinnon did not discuss the question whether the legislative veto violated the doctrine of separation of powers.

[85] A federal district court in Montana recently upheld a statute empowering a House committee to declare an "emergency situation" with regard to public lands and to direct the Secretary of the Interior to withdraw the lands from mineral leasing activities. The court construed the statute narrowly as leaving to the Secretary the decision on the scope and duration of the withdrawal, however, so as to avoid problems under the separation of powers doctrine. *Pacific Legal Foundation* v. *Watt*, 50 U.S.L.W. 1102 (D. Mont. 12 Jan. 1982).

Impressively, in the past two years three state supreme courts have declared legislative veto schemes to be in violation of state constitutions. *See Opinion of the Justices*, 431 A.2d 783 (N.H. 1981) (violates state constitutional requirements of bicameral action by a majority of both legislative houses and presentation to executive for approval or veto); *State ex rel. Barker v. Manchin*, 279 S.E.2d 622 (W. Va. 1981) (violates state separation of powers doctrine); *State* v. *A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alas. 1980) (violates state constitutional requirement of presentation to executive).

[86] 556 F.2d 1028 (Ct. Cl. 1977) (per curiam), *cert. denied*, 434 U.S. 1009 (1978).

mendations for salaries of certain government officials became law unless either house of Congress disapproved them within thirty days.[87] In March 1974 the Senate vetoed the President's recommendations for judicial salary increases, and 140 federal judges brought suit claiming inter alia that the veto provision was unconstitutional. In rejecting this claim the court emphasized that it was focusing only "on this specific mechanism in this specific statute—how it works, what it involves, what values and interests are implicated—not on an overarching attempt to cover the entire problem of the so-called legislative veto, or even a large segment of it." [88]

The *Atkins* majority began by determining that Congress had power under the Necessary and Proper Clause to enact a veto provision. It then found that the Act's legislative review provision did not violate either the principle of bicameralism, because "the one-House veto does not alter the existing law in any fashion, but only preserves the legal *status quo*"; [89] the Presentment Clause, because the President was permitted to recommend whatever he wished, including no recommendation at all; [90] or the separation of powers doctrine, because the veto provision is an aid to legislative policymaking and does not interfere with any essential executive function.[91] The three judges in dissent disagreed completely, arguing that the veto provision violated all of these constitutional doctrines.[92]

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[87] 2 U.S.C. § 359(1) (1976). This provision was amended in 1977 to provide that the recommendations take effect only if approved by both houses. 2 U.S.C. § 359(1) (Supp. III 1979).

[88] 556 F.2d at 1059.

[89] *Id.* at 1063.

[90] *Id.* at 1065.

[91] *Id.* at 1069-70.

[92] *Id.* at 1075-82 (Shelton, J., concurring in part and dissenting in part).

The other federal court ruling is *Chadha* v. *Immigration & Naturalization Service*,[93] in which the Ninth Circuit struck down a provision of the Immigration and Nationality Act allowing either house of Congress to veto a suspension of deportation granted by the Attorney General.[94] The Immigration and Naturalization Service ("INS") ruled that Chadha could remain in the United States even though he was deportable, but the House vetoed this decision and the INS issued a final order of deportation. Chadha petitioned for appellate review. A unanimous panel declared the veto provision violative of the doctrine of separation of powers.

The court held that such a violation occurs when there is "an assumption by one branch of powers that are central or essential to the operation of a coordinate branch, provided also that the assumption disrupts the coordinate branch in the performance of its duties and is unnecessary to implement a legitimate policy of the Government."[95] It then stated that however the congressional review power was characterized, its use in the immigration context was unconstitutional: if used as a "correction of judicial or executive misapplication of the statute," it interfered with a core function of the Judiciary;[96] if used as a "means for sharing the administration of the statute with the Executive on an ongoing basis," it interfered with a core function of the Executive;[97] and if used as an "exercise of a residual legislative power," it violated the constitutional requirement of bicameralism.[98] Like the majority in *Atkins*, the *Chadha* court sought to minimize the reach of its holding:

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[93] 634 F.2d 408 (9th Cir. 1980), *consideration of juris. postponed until hearing on merits*, 102 S. Ct. 87 (1981).

[94] 8 U.S.C. § 1254(c)(2) (1976).

[95] 634 F.2d at 425.

[96] *Id.* at 429; *see id.* at 429-31.

[97] *Id.* at 429; *see id.* at 431-33.

[98] *Id.* at 429; *see id.* at 433-35.

> [W]e are not here faced with a situation in which the unforeseeability of future circumstances or the broad scope and complexity of the subject matter of an agency's rulemaking authority preclude the articulation of specific criteria in the governing statute itself. Such factors might present considerations different from those we find here, both as to the question of separation of powers and the legitimacy of the unicameral device.[99]

This background makes clear that this case is truly one of first impression. The Supreme Court has never ruled on the legislative veto, and neither of the one-house veto decisions deals with legislative review of agency rulemaking. We therefore cannot rest our decision on any precedent but must consider carefully the applicability of the constitutional provisions relied on by both sides to the dispute.

B. *Political Question*

Congressional amici argue that this court should not decide the constitutionality of the one-house veto because this is a political question. They contend that until recently "the political branches resolved their disputes in this context solely by political means, without any intervention by the courts," and that "a stalemate or impasse on general principles necessitating judicial intervention is lacking." [100] Since the Senate supports the legality of the House's action in this case, and since the Executive apparently agrees with the House on the undesirability of expanding incremental pricing, all that is presented here is "an abstract constitutional position." [101] Citing this court's en banc decision in *Clark* v. *Valeo*,[102] in which we refused to reach the merits of a challenge to a one-

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[99] *Id.* at 433 (footnotes omitted).

[100] Brief for Congressional Amici at 51-52.

[101] *Id.* at 52.

[102] 559 F.2d 642 (D.C. Cir.) (en banc) (per curiam), *aff'd mem. sub nom. Clark* v. *Kimmitt*, 431 U.S. 950 (1977).

house veto provision, Congressional amici argue that this issue should be left to the politically representative branches.[103]

This reliance on *Clark* v. *Valeo* is misplaced. The *Clark* majority held that "the matter before us does not present a ripe 'case or controversy' within the meaning of Article III," while specifically stating that "we need not address those [questions] pertaining to standing or political question, because the unripeness of the action is so pervasive."[104] The case lacked ripeness because the legislative review provision at issue had not been invoked: "Until Congress exercises the one-house veto, it may be difficult to present a case with sufficient concreteness as to standing and ripeness to justify judicial resolution of the pervasive constitutional issue which the one-house veto provision involves."[105] Here, of course, the House of Representatives did exercise the disapproval power conferred by section 202(c), thus presenting us with a concrete case in which to adjudicate the constitutionality of the one-house veto.[106]

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[103] Congressional amici raise the political question argument only with regard to the Presentment Clause, but address their arguments generally to whether this court should decide the case as a whole. We address the political question issue as if it had been raised in defense to all of petitioners' constitutional claims.

[104] 559 F.2d at 647.

[105] *Id.* at 649.

[106] The court also stated: "Were this court to decide the threshold 'case or controversy' questions differently, it would nevertheless refuse to reach the merits of the unicameral veto under the doctrine of judicial prudence enunciated in *Samuels* v. *Mackell*, 401 U.S. 66, 73, 91 S. Ct. 764, 27 L. Ed. 2d 688 (1971)." *Id.* at 650 n.10. This "doctrine of judicial prudence," however, is limited to the declaratory judgment context. *Samuels* v. *Mackell*, a companion case with *Younger* v. *Harris*, 401 U.S. 37 (1971), held that a district court should refuse to grant relief by way of declaratory judgment to a

*Baker* v. *Carr* [107] set forth the relevant political question considerations, which, as recently summarized by Justice Powell, lead to "three inquiries: (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" [108] The first two issues are easily resolved. Nothing in Article I, Section 7 suggests that Congress is per-

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plaintiff who raises an issue that is the subject of a pending state criminal prosecution against that plaintiff.

The court's obvious concern was that it not "strain to exercise its jurisdiction to resolve this momentous political as well as legal problem." 559 F.2d at 650. Significantly, its reasons for refusing to hear the case do not apply here. The court stated that "[a] constitutional decision might better await an attack upon legislative review by the entity subject to such review, which could be informed by the testimony of those who felt constrained to withhold proposals because of veto indications from the reviewing authorities." *Id.* at 650 n.10. But here FERC decided that "it would be wholly inappropriate for the Commission to be a partisan in any potential conflict between Congress and the Executive." Brief for Respondent at 13 n.14. Moreover, the question whether the agency felt constrained in its rulemaking is irrelevant here because the rule was vetoed. The *Clark* majority declared that judicial consideration of "legislative review mechanisms ought at an absolute minimum to be informed by experience and not depend solely on abstract analysis or speculation," so that the issue would be adjudicated in "a concrete setting, of regulations rejected or clearly trimmed in advance of submission." 559 F.2d at 650 n.10. These conditions are satisfied by the House veto. Far from having merely a "bare 'case or controversy,'" *id.*, we have a live dispute that presents us with "a proper record compiled in an appropriate adversary proceeding with briefing of the issue worthy of its importance." *Id.* at 649 n.8.

[107] 369 U.S. 186, 217 (1962).

[108] *Goldwater* v. *Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring).

mitted to decide when a legislative action must be performed by both houses and presented to the President; indeed, the inclusion of Clause 3 of that section was intended to prevent Congress from subverting the presentation requirement by merely restyling the nature of its action.[109] Both requirements are specific limitations on congressional power, and it would be exceedingly anomalous to hold that the Framers meant for Congress to determine when the limitations apply. Moreover, no special nonjudicial expertise is needed in determining their applicability. Rather, these issues require "no more than an interpretation of the Constitution." [110]

*Baker* listed three prudential considerations that might lead a court to refuse to resolve a constitutional issue: "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." [111] The latter two are plainly inapplicable here, so the contention must rest on the need to respect the political branches. Congressional amici contend that a judicial resolution would violate that respect because the Legislature and the Executive have been able to resolve the dispute over the legislative veto "solely by political means" [112] and because the dispute remains relatively young. They also contend that there actually is no "real dispute" [113] over the propriety of the Phase II rule, and that combined with the lack of a stalemate on the veto issue,

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[109] *See* note 128 *infra*.

[110] *Powell* v. *McCormack*, 395 U.S. 486, 548 (1969).

[111] 369 U.S. at 217.

[112] Brief for Congressional Amici at 51.

[113] *Id.*

this is reason enough for this court to defer resolution. We disagree.

Whether there is a "real dispute" over the policy choice not to implement the Phase II rule is irrelevant. The critical dispute is whether the procedure by which that choice was made is constitutional. To accept Congressional amici's implicit principle we would have to hold that we will not hear any Executive challenge to the constitutionality of a legislative action, no matter how obviously unconstitutional, if we find that the Executive supports the policy embodied in that legislative act.[114] Moreover, Congressional amici's emphasis on the policy views of the President ignores the fact that petitioners are private parties with an important stake in the resolution of this issue.[115]

We also reject the contention that "the President and Congress have not yet had time to reach a solution or

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[114] Congressional amici also state: "The Senate's support for the House in this brief highlights the abstractness of petitioners' asserting a right of the Senate to check the House." *Id.* at 52 n.48. Congressional amici completely misread the purpose of the bicameralism requirement when they assert that so long as the Senate and House agree that one house may act alone there is no constitutional problem. If petitioners are correct, the veto represents a legislative action that the Constitution intended both houses to approve; the two houses' agreement to violate that intent cannot stand. Such a revision of constitutional intent can be accomplished only by constitutional amendment, not by mere agreement embodied in a statute.

[115] *Cf. Goldwater* v. *Carter*, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring in judgment) (in discussing why *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), did not present a political question, emphasizing that "private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, an action of profound and demonstrable domestic impact").

else settle into a stalemate."[116] Legislative review of independent agency rulemaking may be relatively new, but for sixty years there has been "a long tug of war between the Executive and Legislative Branches of the Federal Government" over the constitutionality of legislative review devices.[117] Congressional amici themselves note that Congress has enacted over 200 such provisions since 1932.[118] Legislative review provisions or similar measures have been attacked as unconstitutional by the administrations of Presidents Wilson, Hoover, Roosevelt, Truman, Eisenhower, Kennedy, Johnson, Nixon, Ford, Carter, and now, as exemplified by the position of the United States as amicus curiae, Reagan.[119] A common form of objection has been to express reservations when signing bills into law,[120] but Presidents have also vetoed

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[116] Brief for Congressional Amici at 53. Even if there were a long history of the use of the legislative veto, it does not automatically follow that the courts would refuse to intervene. *See Powell* v. *McCormack*, 395 U.S. 486, 546-47 (1969) ("That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date.")

[117] *Buckley* v. *Valeo*, 424 U.S. 1, 140 n.176 (1976) (per curiam).

[118] Brief for Congressional Amici at 50. *See generally* Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983, 1089-92 (1975) (listing statutes).

[119] *See* Watson, *supra* note 118, at 988 n.9. There has also been a considerable number of congressmen opposed to the legislative veto on constitutional grounds. *See, e.g., id.* at 988 n.11. *See generally id.* at 1002-29.

[120] The most famous example is President Roosevelt's decision to sign the Lend-Lease Act of 1941, but to submit to his Attorney General a memorandum, to be published when to do so would not offend political allies, stating his view that the Act's provision allowing the Act's authorization to be terminated by concurrent resolution was unconstitutional. *See* Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353

bills on the ground that legislative veto provisions were unconstitutional.[121] This historical record shows that the dispute is neither new nor temporary, but rather represents a clear disagreement between the political branches as to the meaning of the Constitution. A judicial resolution is therefore appropriate.[122]

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(1953). For other examples, see Dixon, *supra* note 82, at 429-32 & nn.23-24, 29 (Ford and Carter); Watson, *supra* note 118, at 1016 n.160 (Eisenhower). To some extent, presidential opposition appears to have been tempered by the presidential desire to obtain statutory authority. *See* J. BOLTON, THE LEGISLATIVE VETO 10-13 (1977).

[121] *See, e.g.*, Dixon, *supra* note 82, at 428 & n.21, 429 & n.24, 432 & n.29 (vetoes by Nixon, Ford, and Carter). The Ford and Carter administrations testified strongly against the constitutionality of the legislative veto in various legislative hearings. *See Improving Congressional Oversight of Federal Regulatory Agencies: Hearings on S. 2258, et al., Before the Senate Comm. on Government Operations*, 94th Cong., 2d Sess. 124 (18-25 May 1976) (statement of Assistant Attorney General Antonin Scalia); Letter from Assistant Attorney General Patricia M. Wald to Rep. Peter W. Rodino, Jr. (5 May 1977) (letter prepared in response to congressional request for Justice Department opinion), *cited in* McGowan, *supra* note 82, at 1141-42. President Carter also issued a personal message to Congress arguing the unconstitutionality and undesirability of legislative veto mechanisms. Message to the Congress, 14 WEEKLY COMP. PRES. DOC. 1146 (21 June 1978).

In 1980 Secretary of Education Hufstedler, acting pursuant to an opinion by Attorney General Civiletti, refused to revise a regulation vetoed by Congress and declared that the regulation was still in effect. The regulation was withdrawn in 1981 by the new Secretary, thus ending the confrontation. *See* Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the 'Independent' Agencies*, 75 NW. U.L. REV. 1064, 1078 n.55 (1981).

[122] Congressional amici rely on this court's statement in *United States* v. *American Tel. & Tel. Co.*, 567 F.2d 121 (D.C. Cir. 1977), that "[t]he framers, rather than attempting to define and allocate all governmental power in minute detail, relied, we believe, on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the

C. *The Necessary and Proper Clause*

Article I, Section 8, Clause 18 of the Constitution gives Congress power "To make all Laws which shall be nec-

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dispute in the manner most likely to result in efficient and effective functioning of our governmental system." *Id.* at 127. They neglect to cite, however, the statement more relevant to the situation here: "Where the dispute consists of a clash of authority between two branches, however, judicial abstention does not lead to orderly resolution of the dispute." *Id.* at 126. *Cf. Chadha*, 634 F.2d at 419 ("It would stand the political question doctrine on its head to require the Judiciary to defer to another branch's determination that its acts do not violate the separation of powers principle.").

We also find it ironic that Congressional amici urge the political question doctrine so strongly upon us, given that a recent statute calling for congressional review of independent agency rulemaking specifically *requests* the courts to determine the statute's constitutionality as soon as possible:

> (f) (1) Any interested party may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this section. The district court immediately shall certify all questions of the constitutionality of this section to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.
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> (2) Notwithstanding any other provision of law, any decision on a matter certified under paragraph (1) shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought not later than 20 days after the decision of the court of appeals.
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> (3) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under paragraph (1).

15 U.S.C. 57a-1(f) (West Supp. 1981) (FTC rulemaking). Congress' apparent desire to obtain an immediate ruling on the constitutionality of the FTC congressional veto contrasts sharply with its argument here that the issue is nonjusticiable because it is properly resolved by the political branches.

essary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Since *McCulloch* v. *Maryland*,[123] the Supreme Court has construed this authorization to permit Congress to exercise broad legislative powers not expressly enumerated in the Constitution. Congressional amici urge that under this principle the legislative veto must be upheld as a modern technique necessary for preserving the flexibility of congressional action. The Court of Claims in *Atkins* adopted this argument:

> In particular we note that the necessary and proper clause, which has sanctioned the massive delegation of legislative functions over the past century, provides a firm grounding for this veto. Congress plainly felt the need for this veto device, instead of relying solely on the power to override presidential recommendations by a full-fledged statute. In *McCulloch's phrases*, Congress exercised "its best judgment" in the selection of this measure and sought to "accommodate its legislation to circumstances." [124]

Congressional amici conclude: "The Necessary and Proper Clause is the Constitution's expression that Congress must not be denied the flexible means needed to deal with exactly the kind of extraordinarily divisive issues resolved in the conference compromise that created § 202(c)." [125]

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[123] 17 U.S. (4 Wheat.) 316 (1819).

[124] 556 F.2d at 1071.

[125] Brief for Congressional Amici at 37. We reject the notion that the "extraordinarily divisive issues" presented in this case provide some special justification for use of the veto here. *See id.*; Gas Suppliers at 51 ("these unique circumstances"). Although many congressmen may have considered the NGPA and the comprehensive energy package to be two of the more difficult legislative decisions they had ever faced, there is nothing particularly unique about the use of the veto in this situation. Rather it is a typical provision au-

In our view, the Necessary and Proper Clause fails to advance the argument on behalf of the one-house veto. We do not understand either petitioners or the United States to contend that, in the absence of the asserted constitutional violation the legislative veto provision would be unconstitutional because Congress does not have the authority to enact it. Rather, the claim is that however "necessary" Congress found this particular veto provision, it is not "proper" because it has other constitutional infirmities. The Necessary and Proper Clause does not override other provisions of the Constitution. *McCulloch* stated the test as follows: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." [126] Plainly there is dispute whether the veto is "consistent with the letter and spirit of the Constitution," and reference to the Necessary and Proper Clause will not provide the answer. As the Ninth Circuit noted in *Chadha*, the clause "authorizes Congress to 'make all laws,' not to exercise power in any way it deems convenient. That a power is clearly committed to Congress does not sustain an unconstitutional form in the exercise of the power." [127]

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thorizing one house of the Congress to veto a rule promulgated by an agency. We see no principled way of distinguishing the use of the veto in cases involving "extraordinarily divisive issues" from those involving "routine" issues. *Cf. Buckley* v. *Valeo*, 424 U.S. 1, 132 (1976) (per curiam) ("We see no reason to believe that the authority of Congress over federal election practices is of such a wholly different nature from the other grants of authority to Congress that it may be employed in such a manner as to offend well-established constitutional restrictions stemming from the separation of powers.").

[126] 17 U.S. (4 Wheat.) at 421.

[127] 634 F.2d at 433. *See also Buckley* v. *Valeo*, 424 U.S. 1, 134-35 (1976) (per curiam) (rejecting argument that Neces-

D. *The Constitutional Lawmaking Process*

Article I, Section 7, Clause 2 provides that "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be

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sary and Proper Clause provides authority to enact statutes violating other constitutional provisions).

Congressional amici suggest that Congress' power to employ the veto comes not from the first half of the Necessary and Proper Clause, which deals *vertically* with Congress' power in relation to the states, but rather from the second half, which deals *horizontally* with Congress' power over the Executive and the Judiciary. *See* Brief for Congressional Amici at 36 n.33. The majority opinion in *Atkins* made the same point, but, like Congressional amici, did not explain its significance, instead merely citing to an article written by Professor Van Alstyne. *See* 556 F.2d at 1069. The thesis of this article is that this largely ignored second half of the clause actually is the source of exclusive congressional control over all nonessential powers exercised by the other two branches: "I will contend that this clause assigns to Congress alone the responsibility to say by law what additional authority, if any, the executive and the courts are to have beyond that core of powers that are indispensible, rather than merely appropriate, or helpful, to the performance of their express duties under articles II and III of the Constitution." Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, LAW & CONTEMP. PROB., Spring 1976, at 102, 107.

The potential breadth of this argument is staggering. This view of the horizontal effect of the Necessary and Proper Clause calls into question the correctness of Supreme Court decisions recognizing the existence of executive privilege, *see United States* v. *Nixon*, 418 U.S. 683 (1974), executive power of removal of executive officers, *see Myers* v. *United States*, 272 U.S. 52 (1926), the supervisory power of the courts, and the power of the judiciary to provide for damage actions to vindicate constitutional rights, *see Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). *See* Van Alstyne, *supra*, at 107-31. In other words, acceptance of the view that the second half of the clause places stringent limits on the inherent powers of the Executive and the Judiciary

presented to the President of the United States." Clause 3 of the same section similarly provides that "Every Order, Resolution, or Vote, to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States." [128] In

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could work a radical transformation in the distribution of constitutional powers resulting from two centuries of judicial review. The author himself concedes that his article might be regarded "as an heretical and 'revisionist' treatment of the constitutional principle of separated powers." *Id.* at 118. Plainly, such a change should come, if at all, only from the Supreme Court.

Moreover, we think the question of the inherent powers of the Executive and Judiciary is not central here. The Executive does not contend that it has inherent power to conduct rulemaking in the absence of a delegation from Congress. Rather, the claim is that when Congress does enact a law requiring the Executive or an independent agency to act, Congress may not then reserve for itself the right to nullify, by other than legislation passed by both houses and presented to the President, the decisions made by the administrator in carrying out the law. In other words, the question before us is not whether some power is implicit in the Constitution's grant of powers to the Executive; it rather is whether Congress may veto decisions the Executive has made pursuant to a legislative delegation. *See* Dixon, *supra* note 82, at 477-79. This question does not involve the Necessary and Proper Clause, which is properly read as "a means of making the exercise of powers by the various branches effective, not as a means of shifting powers between the branches of government." *Special Prosecutor: Hearings Before the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 453 (1973) (testimony of Acting Attorney General Bork). The second half of the Necessary and Proper Clause no more empowers Congress to contravene constitutional requirements than does the first half.

[128] Clause 3 was inserted to prevent Congress from evading the requirements of Clause 2 by merely calling its action something other than a "bill." The Convention enacted this additional clause by a 9-1 vote. *See* 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 301-02, 304-05 (rev'd ed. 1937).

each case the President may give either his approval, in which case the action of Congress becomes law, or his disapproval, in which case the action may not become law unless it is repassed by two-thirds of both the House and the Senate. These provisions set up the fundamental prerequisites to the enactment of federal laws: bicameral passage of the legislation,[129] and presentation for approval or disapproval by the President.

Congressional amici make three basic arguments in support of their contention that a legislative veto may be exercised without regard to these two requirements. First, they assert that the one-house veto is similar to other types of legislative action which historically have been undertaken by one house alone and which have not been presented to the President. Second, they assert that an agency rule subject to congressional veto is merely a proposal which can be rejected by either house of Congress in the same way that proposed legislation may be rejected by either house. Finally, they analyze the purposes of the bicameralism and presentation requirements, and conclude that these purposes do not mandate application of the requirements to the exercise of the one-house veto. We reject each of these arguments, and hold that congressional disapproval of final agency rules must be conducted in accordance with the requirements of Article I, Section 7.

1. *Exceptions to the requirements of Article I, Section 7*

Congressional amici emphasize that Article I, Section 7, Clause 3 provides that the presentation requirement applies to actions "to which the Concurrence of the Senate and House of Representatives *may* be necessary," and assert that "[t]he term 'may' has a meaning here con-

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[129] Article I, Section 1 also makes clear that legislation shall be enacted by a bicameral Congress: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

sistent with its ordinary and usual construction; some actions of the Congress may require concurrence and presentation, while others may not." [130] They cite "four categories of actions, having the force of law and affecting persons outside the Congress," [131] that historically have been conducted by only one house or have not been presented to the President, or both, and assert that this demonstrates that Article I, Section 7 should be flexibly construed.

We agree that not every action taken by Congress automatically must receive the concurrence of both houses and be presented to the President for approval, but we reject the implication that these requirements are often and lightly ignored. On the contrary, the exceptions are clearly narrow and provide no support for finding Article I, Section 7 inapplicable to one-house consideration of an agency rule.

a. *Legislative initiation of agency investigations*

This category actually refers only to statutory authority which at one time permitted either house or the President to require the Federal Trade Commission ("FTC") to investigate prescribed subjects.[132] The critical difference between investigation and rulemaking was identified in *Buckley* v. *Valeo*.[133] The Supreme Court declared that powers "of an investigative and informative

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[130] Brief for Congressional Amici at 56 (emphasis in original).

[131] *Id.* at 57.

[132] 15 U.S.C. § 46(d) (1976) gives the FTC power "Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation." This is modified by *id.* § 46a, which states that "After June 16, 1933, no new investigations shall be initiated by the Commission as the result of a legislative resolution, except the same be a concurrent resolution of the two Houses of Congress."

[133] 424 U.S. 1 (1976) (per curiam).

nature" can be performed by a commission constituted of legislatively appointed officers, because the powers fall "in the same general category as those powers which Congress might delegate to one of its own committees." [134] Rulemaking, on the other hand, "represents the performance of a significant governmental duty exercised pursuant to a public law," [135] and thus cannot be conducted by such a commission. This FTC provision, therefore, tells nothing about whether Article I, Section 7 applies to a resolution disapproving a rule. A resolution enacted under this statute does not affect substantive law, as occurs when Congress vetoes an agency rule, but only instructs the FTC to conduct an investigation.[136] Congress' powers with regard to investigations are unique and irrelevant to its power to make law.

b. *Presidential plans for executive reorganization*

For much of this century, the President has been authorized to formulate executive reorganization plans which will take effect unless either house votes a resolution of disapproval.[137] Since these provisions raise the

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[134] *Id.* at 137.

[135] *Id.* at 141.

[136] In *Atkins* the Court of Claims noted that "Congress is acknowledged to have . . . the power to carry on investigations, even though this . . . is not expressly provided for in the Constitution." 556 F.2d at 1062, and used this as evidence that Congress may deviate from the requirements of Article I, Section 7 even where not expressly provided in the Constitution. The Supreme Court has held, however, that the investigatory power is "an essential and appropriate auxiliary to the legislative function," and therefore is implicit in Article I, Section 1. *McGrain* v. *Daugherty*, 273 U.S. 135, 174 (1927). The power therefore is constitutionally based. Article I, Section 7 does not apply because investigations are an incident to the legislative power, not an exercise of it that produces binding substantive rules of conduct.

[137] The current authorization is at 5 U.S.C. § 906 (Supp. III 1979).

same unresolved constitutional questions presented in this case, they cannot be viewed as support for the contention that Article I, Section 7 may be ignored. It is true that the Executive has generally supported the constitutionality of this basic statutory scheme, but only on limited and narrow grounds.[138] While this apparent accommoda-

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[138] *See, e.g.*, 43 Op. Att'y Gen. 2 (31 Jan. 1977) (Attorney General Bell) [hereinafter Bell Opinion] (expressing "opinion that the [disapproval] procedures provided in . . . the reorganization statute are constitutionally valid," but emphasizing this "is to be taken in no manner as approving the constitutionality of the procedure of congressional disapproval of executive action by resolution in other statutes"). *But see* 37 Op. Att'y Gen. 56, 63-64 (1933) (Attorney General Mitchell ) ("The attempt to give to either House of Congress, by action which is not legislation, power to disapprove administrative acts, raises a grave question as to the validity of the entire provision in the [statute] for Executive reorganization of governmental functions.").

The view that reorganization statutes are a legitimate exception to the requirements of Article I, Section 7 is based on a "reverse legislation" theory, which holds that when Congress authorizes the President to make any proposal (including none at all) on a given subject matter, free from all procedural constraints but subject to a one-house veto, the basic requirements of Article I, Section 7 are fulfilled. One elaboration of the theory is as follows:

> In more precise constitutional terms, the essential aspects of a potential "reverse legislation" exception to the general objection to one-house vetoes are the following: (1) viewing such statutes as the Salary and Reorganization Acts as calling for a discrete sequence of legislative choices (even though loosely bound together by an initial statute) that are not intertwined with program administration, article II considerations are not reached; (2) the President's article I role is preserved because instead of having a veto power at the end, he has a proposal power at the beginning; (3) the congressional role is preserved because unless both houses concur, by withholding a negative, the status quo remains unchanged; and (4) it is critical to the safeguarding of the President's role in this context that there be no selective or partial veto power in Congress. If Congress has a power to modify, that is, to negate part of the President's

tion between the Executive and the Congress on use of the veto in reorganization statutes might be relevant to a

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proposal but not all of it, with no opportunity for the President to say whether he would agree to severability, then his constitutional parity with Congress in lawmaking is undermined.

Dixon, *supra* note 82, at 485. *See also* Bell Opinion, *supra*, at 2-5. Under the reverse legislation theory, the *Atkins* case was properly decided, even though it did not expressly rely on this rationale. *See, e.g.*, Dixon, *supra* note 82, at 471. *But cf.* Bell Opinion, *supra*, at 5 (one-house veto "is uniquely appropriate to executive reorganization," which is "a matter in which the President has a peculiar interest and special responsibility.").

Many commentators have challenged the viability of the reverse legislation theory. *See, e.g.*, Nathanson, *supra* note 121, at 1090; McGowan, *supra* note 82, at 1141 n.93, 1159 & n.176; Scalia, *The Legislative Veto: A False Remedy For System Overload*, REGULATION, Nov./Dec. 1979, at 19, 22. *See also Separation of Powers: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 250-51 (19-20 July, 2 Aug. 13-15 Sept. 1967) [hereinafter *"Separation of Powers Hearings"*] (statement of Alexander Bickel) (if reorganization act veto is constitutional, all legislative vetoes are constitutional). A major problem is that it concedes that the original congressional delegation is standardless and that the real congressional action in authorizing presidentially formulated policy comes from the failure of either house to disapprove. As the Ninth Circuit observed in *Chadha*, there are grave problems with such a theory of approval by inaction—"an inaction that could equally imply endorsement, acquiescence, passivity, indecision, or indifference." 634 F.2d at 435. And, as we discuss at note 167 *infra*, the entire theory breaks down if the scheme is changed to disapproval by *concurrent* resolution. Finally, although the theory purports to be a limited exception to Article I, Section 7, it actually could support "a regime under which any presidential proposal on a given subject would become part of the United States Code if no house of Congress objected within, say, sixty days." *Chadha*, 634 F.2d at 435.

As some observers have noted, a true reverse legislation scheme would be where presidential proposals took effect only

challenge to those statutes, it does not bear on the veto's constitutionality in rulemaking or other contexts, where the Executive has strongly opposed the one-house disapproval device.

c. *Presidential foreign affairs and national defense decisions*

Congress has often combined its delegation of foreign affairs authority to the Executive with provisions for disapproval of actions by concurrent resolution.[139] As with the veto in reorganization statutes, the constitutionality of these provisions has not been resolved, and they therefore cannot serve as solid support for finding exceptions to Article I, Section 7.[140] And, although a number of

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if *approved* by *both* houses of Congress. The roles of each branch would be reversed in time, but not in substance. *See* Watson, *supra* note 118, at 1072. This is how the Federal Salary Act, which formerly authorized the one-house veto device at issue in *Atkins*, now stands. 2 U.S.C. § 359(1) (Supp. III 1979).

In any event, whatever the validity of the reverse legislation hypothesis, it clearly is inapplicable here because (1) FERC is an independent agency and it, not the President, formulated the Phase II rule; (2) FERC was required, not simply permitted, to issue such a rule; and (3) the veto disrupted an ongoing administrative program.

[139] *See, e.g.*, 50 U.S.C. § 1544(c) (1976) (War Powers Resolution) (presidential authority to use armed forces without declaration of war or specific statutory authorization may be terminated by concurrent resolution); *id.* § 1622(a)(1) (presidential declaration of national emergency may be terminated by concurrent resolution).

[140] In normal contexts, the Supreme Court has held that concurrent resolutions have the force of law only if presented to and approved by the President. *See United States* v. *California*, 332 U.S. 19, 28 (1947) (vetoed joint resolution "does not represent an exercise of the constitutional power of Congress to dispose of public property under Article IV, § 3, Cl. 2"); *United States ex rel. Levey* v. *Stockslager*, 129 U.S. 470, 475 (1889) (joint resolution "was approved by the Presi-

these schemes have been enacted, the Executive has never completely accepted their constitutionality.[141] In any event, the foreign affairs veto presents unique problems since in that context there is the additional question whether Congress or the President or both have the inherent power to act.[142]

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dent, and took effect only on such approval"). *See also Watts* v. *United States*, 161 F.2d 511, 513 (5th Cir.) ("A joint resolution of the House and Senate, when approved by the President, has the effect of law."), *cert. denied*, 332 U.S. 769 (1947). Thus, although it is true that "Congress can express its opinion through resolutions which are not subject to presidential veto, even though such power is not expressly granted in the Constitution," *Atkins*, 556 F.2d at 1062, this point is irrelevant to our analysis, because such "opinion" resolutions have no substantive effect.

[141] For example, the War Powers Resolution, *see* 50 U.S.C. §§ 1541-1548 (1976), was passed over President Nixon's veto, which was based in part on his belief that § 5(c) (50 U.S.C. § 1544(c)), requiring immediate withdrawal of troops if Congress enacts a joint resolution not presented to the President, was unconstitutional. The President's Message to the House of Representatives Returning H.J. Res. 542 Without His Approval, 9 WEEKLY COMP. PRES. DOC. 1285, 1286 (24 Oct. 1973). And when President Ford signed the International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729 (1976) (codified in scattered sections of 22 U.S.C.), he expressed his reservations about the constitutionality of section 211(a) (22 U.S.C. § 2776(b) (1976)), which permits Congress to veto proposed arms sales by concurrent resolution. *See* Statement by the President on Signing H.R. 13680 Into Law, 12 WEEKLY COMP. PRES. DOC. 1104, 1105 (1 July 1976).

[142] Presidents have long maintained that congressional authorizations of the use of military force are unnecessary. *See, e.g.*, S. REP. No. 797, 90th Cong., 1st Sess. 22 (1967) (statement of President Johnson, 18 Aug. 1967) (" 'We stated then, and we repeat now, we did not think the [Gulf of Tonkin] resolution was necessary to do what we did and what we're doing.' "] No such claim is made with regard to rule-making authorizations.

d. *Congressional proposals for constitutional amendments*

The final category cited by Congressional amici is the only one in which there is a judicial decision holding that Article I, Section 7 did not entirely apply. In *Hollingsworth* v. *Virginia* [143] the Supreme Court ruled that proposals for constitutional amendments, although requiring the concurrence of both houses, do not require presentation to the President. The Court did not explain this holding, but Justice Chase stated in a footnote to the Attorney General's brief: "The negative of the president applies only to the ordinary cases of legislation; he has nothing to do with the proposition or adoption of amendments to the constitution." [144] By not mentioning presidential participation, Article V, which sets forth the procedure for amending the Constitution, makes clear that proposals for constitutional amendments are congressional actions to which the presentation requirement does not apply.[145] No constitutional provision does the same with regard to resolutions disapproving agency

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[143] 3 U.S. (3 Dall.) 378 (1798).

[144] *Id.* at 381 n."a" (Chase, J.). *See also id.* (argument of the Attorney General) ("[T]he case of amendments is evidently a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of investing the president with a qualified negative on the acts and resolutions of congress.").

[145] There are other express constitutional exceptions to one or both requirements of Article I, Section 7. *See* U.S. CONST. art. I, § 2, cl. 5 (House has "sole Power of Impeachment"); *id.* art. I, § 3, cl. 6 (Senate has "sole Power to try all Impeachments"); *id.* art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members"); *id.* art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member"); *id.* art. II, § 2, cl. 2 (Senate has power to concur in treaties and give advice and consent to presidential appointments).

rules. The reasons for not presenting a proposed amendment to the President therefore are irrelevant.[146]

Thus, we agree with the main point of Congressional amici—that Article I, Section 7 does not apply rigidly to every single congressional activity—but we resist their implication that law or history supports a relaxed construction of the presentation and bicameralism requirements. Only with regard to constitutional amendments is there a Supreme Court ruling that the Presentment Clause does not apply, and that is clearly an exceptional case. The other alleged exceptions either do not represent substantive lawmaking,[147] as with initiation of agen-

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[146] Congressional amici assert that "actions of the Houses accord with the Presentation Clause when they draw their validity from a larger procedure: for legislative review, the enactment of the original legislation delegating authority; for constitutional amendments, the process of state ratification." Brief for Congressional Amici at 60-61. This proposed test makes no sense. A congressional proposal for a constitutional amendment draws its validity from the Constitution, not the process of state ratification. As Justice Chase said, the President simply has no formal role in the process of proposing and ratifying constitutional amendments. Furthermore, we disagree that the delegation of veto authority in the original legislation is sufficient to comply with requirements of the Presentment Clause. *See* pp. 80-81 *infra*.

[147] In *Atkins* the majority noted that many "policy choices" do not require adherence to Article I, Section 7: decisions "not to introduce a bill, or not to vote on a bill once introduced," or committee decisions "which have great policy significance," or individual decisions to make comments which "can often result in changed policies, not only throughout the Federal Government, but in the private sector." *Atkins*, 556 F.2d at 1062 & n.24. These statements are of course true, but they prove only the obvious, and indeed trivial, point that not every word uttered or action taken within a Congress of 535 members must receive the concurrence of both houses and be presented to the President. None of these actions purport to have the force of law, and they thus are irrelevant to the question whether adherence to Article I, Section 7 is required when Congress, or one house thereof, formally adopts a resolution of disapproval which clearly does affect the substantive law.

cy investigations, or represent limited areas of Executive-Legislative accommodation in the exercise of special powers, an accommodation that nonetheless remains clouded by constitutional controversy. The question remaining, then, is whether there is some reason why the decision of one house to veto a rule should be deemed different from the kind of legislative decisions the Constitution requires to be made by both houses and presented to the President.

2. *Purposes of the lawmaking procedures*

a. *Presentation to the President*

The primary reason for the presidential veto power conferred by Article I, Section 7 was to give the President a defensive weapon against legislative intrusions on the powers of the Executive. The importance of this concern was emphasized by Alexander Hamilton in *The Federalist*:

> The propensity of the legislative department to intrude upon the rights and to absorb the powers of the other departments has been already suggested and repeated; the insufficiency of a mere parchment delineation of the boundaries of each has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defense has been inferred and proved. From these clear and indubitable principles results the propriety of a negative, either absolute or qualified, in the Executive upon the acts of the legislative branches. Without the one or the other, the former would be absolutely unable to defend himself against the depredations of the latter. He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote. And in the one mode or the other the legislative and executive powers might speedily come to be blended in the same hands. If even no propensity had ever discovered itself in the legislative body to invade the rights of the Executive, the rules of just reasoning and theoretic propriety would of themselves teach us that the one ought not to be

> left to the mercy of the other, but ought to possess a constitutional and effectual power of self-defense.[148]

This concern is reflected in the Convention debates, which centered largely on whether the veto should be absolute or qualified and whether the Judiciary should share the veto power with the Executive.[149]

In addition, however, the value of a check against ill-advised legislation was recognized and urged as an important justification for the negative.[150] Hamilton, after

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[148] THE FEDERALIST No. 73, at 489-90 (P. Ford ed. 1898) (A. Hamilton).

[149] *See, e.g.*, 1 M. FARRAND, *supra* note 128, at 97-104, 138-40, 144; 2 M. FARRAND, *supra*, at 73-80, 301-02, 304. *See generally* Watson, *supra* note 118, at 1044-48.

[150] Although the debates indicate that use of a negative as a means of protecting the Executive and Judiciary from legislative encroachment was the primary concern, the veto's potentially more general use was clearly contemplated. *See, e.g.*, 1 M. FARRAND, *supra* note 128, at 97-98 ("Mr. Gerry doubts whether the Judiciary ought to form a part of [the proposed Council of Revision], as they will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality. . . . It was quite foreign from the nature of ye. office to make them judges of the policy of public measures."); *id.* at 104 ("Mr. Gerry observed that a power of suspending might do all the mischief dreaded from the negative of useful laws; without answering the salutary purpose of checking unjust or unwise ones."); *id.* at 139 (Mr. Madison observed that "whether the object of the revisionary power was to restrain the Legislature from encroaching on the other co-ordinate Departments, or on the rights of the people at large; or from passing laws unwise in their principle, or incorrect in their form, the utility of annexing the wisdom and weight of the Judiciary to the Executive seemed uncontestable"); 2 M. FARRAND, *supra*, at 73 (Mr. Wilson stated that "this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an op-

discussing the veto as a means of protecting presidential authority, wrote:

> But the power in question has a further use. It not only serves as a shield to the Executive, but it furnishes an additional security against the enaction of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good which may happen to influence a majority of that body. . . . The primary inducement to conferring the power in question upon the Executive is to

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portunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature."); *id.* ("Mr. Ghorum did not see the advantage of employing the Judges in this way. As Judges they are not presumed to possess any peculiar knowledge of the mere policy of public measures. . . . He thought it would be best to let the Executive alone be responsible."); *id.* at 74 (Mr. Madison said combining the Judiciary with the Executive in the Revisionary power "would moreover be useful to the Community at large as an additional check agst. a pursuit of those unwise & unjust measures which constituted so great a portion of our calamities."); *id.* at 78 ("Col Mason observed that the defence of the Executive was not the sole object of the Revisionary power. He expected even greater advantages from it." Since the Legislature "must be expected frequently to pass unjust and pernicious laws," the "restraining power was essentially necessary.")

The proposal to include the Judiciary in the veto power was defeated, but not due to opposition to the existence of *any* policy check on the Legislature. If that were the case, the President's veto power would also have been defeated, as Madison noted: "If such a Union [between the Executive and the Judiciary] was an improper mixture of powers, or such a Judiciary check on the laws, was inconsistent with the Theory of a free Constitution, it was equally so to admit the Executive to any participation in the making of laws; and the revisionary plan ought to be discarded altogether." *Id.* at 77. The Convention did not discard the plan, nor did it limit the reach of the revisionary power; it simply refused to include the Judiciary.

> enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws through haste, inadvertence, or design.[151]

There can be no doubt, then, that policy use of the presidential veto was within the contemplation of those who drafted and ratified Article I, Section 7.[152]

Early Presidents used the veto rarely, and generally believed that the power was properly employed only against bills that encroached on presidential authority or that were considered unconstitutional.[153] Given the unrestricted text of the Presentment Clause, as well as the inherent difficulty of distinguishing one veto purpose

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[151] THE FEDERALIST No. 73, at 490-91 (P. Ford ed. 1898) (A. Hamilton). *See also* Sherman, *A Citizen of New Haven, II*, in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 240 (P. Ford ed. 1892) (published 25 Dec. 1788) ("The united wisdom and various interests of a nation should be combined in framing the laws. . . . [T]he partial negative vested in the President by the new Constitution on the acts of Congress and the subsequent revision, may be very useful to prevent laws being passed without mature deliberation.").

[152] *See* A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION 338-39 (4th ed. 1970); J. STORY, I COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 885-886 (5th ed. 1905); Clineburg, *The Presidential Veto Power*, 18 S.C.L. REV. 732, 737 (1966); *Federal Administrative Law Developments—1975*, 1976 DUKE L.J. 285, 290.

[153] As Professor Black notes, vetoing a bill on grounds of unconstitutionality is a different, and broader, rationale than vetoing a bill to protect executive authority. Despite the absence of discussion on the former during the debates, there has been little controversy about the validity of this purpose. *See* Black, *Some Thoughts on the Veto*, LAW & CONTEMP. PROB., Spring 1976, at 87, 89; Zinn, *The Veto Power of the President*, 12 F.R.D. 207, 230 (1952).

from another,[154] these limitations could not hold up.[155] Andrew Jackson was the first President openly to declare that he was entitled to exercise the veto on policy grounds,[156] and since then the veto has been used predominantly to disapprove legislative policy. Though there were isolated attempts to strip the President of power to exercise policy vetoes, these never were seriously debated,[157] and by and large such vetoes have been popular with the public.[158] The Supreme Court has several times

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[154] For example, two of Madison's vetoes have been interpreted either as defensive or as policy based. *Compare* Black, *supra* note 153, at 90-91, *with* E. CORWIN, THE PRESIDENT 279 (4th ed. 1957).

[155] Naturally the veto power did not escape the early talent of Americans for conjuring up constitutional limitations out of thin air. The veto was solely a self-defensive weapon of the President; it was the means furnished him for carrying out his oath to 'preserve, protect and defend the Constitution' and was not validly usable for any other purpose; it did not extend to revenue bills, never having been so employed by the King of England; it did not extend to 'insignificant and trivial' matters like private pension bills; it was never intended to give effect merely to presidential desires, but its use must rest on considerations of great weight, and so on and so forth. Although efforts of this sort to forge shackles for the power derived a certain specious plausibility from the rarity of the veto's use in English history, they met with failure from the first.

E. CORWIN, *supra* note 154, at 279 (footnote omitted).

[156] *See* A. KELLY & W. HARBISON, *supra* note 152, at 338-39.

[157] *See* E. CORWIN, *supra* note 154, at 279 (failed attempts to amend the Constitution to strip President of veto power); Black, *supra* note 153, at 91 (attempt to impeach President Tyler for misuse of veto power).

[158] *See* H. HOCKETT, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 1826-1876, at 84-85 (1939); Black, *supra* note 153, at 91 (citing W. BINKLEY, PRESIDENT AND CONGRESS 97-98 (1947)).

stated that the Presentment Clause permits the President to veto legislative decisions he considers unwise.[159]

In sum, there simply can be no serious argument today that it is unconstitutional for the President to use a veto to further his policy views. That this purpose was originally considered secondary makes it no less entitled to consideration. And that there was limited controversy over the purpose's legitimacy is far outweighed by the consistent practice for 150 years that policy vetoes are the rule, defensive vetoes the exception. It makes no sense to argue that the primary and undeniably legitimate use of a constitutional power may be dropped from consideration entirely when deciding whether that provision is applicable to a new situation.[160] To hold that the

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[159] *See, e.g., Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 587 (1952) ("The Constitution limits [the President's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."); *The Pocket Veto Case*, 279 U.S. 655, 678 (1929) ("And it is just as essential a part of the constitutional provisions, guarding against ill-considered and unwise legislation, that the President, on his part, should have the full time allowed him for determining whether he should approve or disapprove a bill, and if disapproved, for adequately formulating the objections that should be considered by Congress, as it is that Congress, on its part, should have an opportunity to re-pass the bill over his objections.").

[160] It may be true that the original understanding was that "the veto would be used only rarely, and certainly not as a means of systematic policy control over the legislative branch," Black, *supra* note 153, at 90, but this is because of the belief that the President would not feel secure enough to exercise the veto frequently, not because of any general opposition to policy vetoes. In any event, it makes no sense to conclude that since the veto power became more powerful than expected, it should not be applied to congressional disapproval resolutions. This confuses two inquiries: (1) whether the veto power should be limited because its use has exceeded original expectations, and (2) whether a disapproval resolution is sufficiently like those congressional

presidential veto power does not have a policy purpose in the legislative review context would logically require that the same holding be applied to all legislation, a result that would alter the balance of Executive-Legislative power so radically that no court could conceive of adopting it. In construing the validity of the failure to present the disapproval resolution to the President, therefore, we must consider both the effect on the President's ability to protect his authority from encroachment and the effect on his ability to check unwise legislation.[161]

b. *Bicameralism*

There is little doubt as to Article I, Section 1's purpose in vesting all legislative powers "in a Congress" consisting of "a Senate and House of Representatives." Perhaps the greatest fear of the Framers was that in a representative democracy the Legislature would be capable of using its plenary lawmaking power to swallow up the other departments of the Government. The Supreme

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actions to which the Presentment Clause, *whatever its scope*, applies, so that the resolution should be presented to the President. It is noteworthy that Professor Black concludes from his analysis not that courts should seek to limit the power of the veto, but that Congress should use concurrent resolutions, which do not have the force of law, to express its policy views where those views otherwise are effectively blocked by the existence of the presidential veto. *See id.* at 99-101.

[161] *Accord Atkins*, 556 F.2d at 1065. We note that the constitutional analysis of the need for presentation of disapproval resolutions does not depend on whether the resolution is simple (one-house) or concurrent, even though the Presentment Clause states that only actions of both houses need be presented. As one commentator has noted, "It verges on irrationality to maintain that action by concurrent resolution, whereby Congress is at least held in check by its own structure, is invalid because the veto clause so states, but that the invalidity of a simple resolution, wherein a single House acts without check, is more in doubt." Watson, *supra* note 118, at 1066 n. 428.

Court noted in *Buckley* that "the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." [162] A corollary fear was that national majorities would be able to exercise unconstrained power, thereby destroying the power of state governments.[163] The answer to both concerns proved to be bicameralism. Requiring the concurrence of two branches in enacting laws would help prevent a single majority from undertaking to control the Federal Government. And the Great Compromise, dividing the Congress into one branch directly representing the people and one branch representing the states, was devised as a means of preserving state power.[164] The overriding objective of bicameralism, then, is to constrain the exercise of the federal legislative power by making sure that the Legislature can act only where representatives of two different constituencies are in agreement.[165]

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[162] 424 U.S. at 129. *See also Chadha*, 634 F.2d at 433 (citing various provisions of Convention debates and *The Federalist*).

[163] *See, e.g.*, 1 M. FARRAND, *supra* note 128, at 336-38.

[164] *See generally* WATSON, *supra* note 118, at 1030-37.

[165] As Madison put it,

> In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.

THE FEDERALIST No. 51, at 345 (P. Ford ed. 1898) (J. Madison).

The scope and force of bicameralism are not diminished by the Convention's rejection of language that would have specified that each house "shall in all cases have a negative on the other." 2 M. FARRAND, *supra* note 128, at 197. The

3. *The one-house veto under Article I, Section 7*

What emerges from our analysis of the purposes of the lawmaking restrictions in Article I is that the Framers were determined that the legislative power should be difficult to employ. The requirements of presentation to the President and bicameral concurrence ultimately serve the same fundamental purpose: to restrict the operation of the legislative power to those policies which meet the approval of three constituencies, or a supermajority of two.[166] If the legislative veto repre-

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debates make clear that there was concern that this language might call into question the specific exceptions to bicameral action, such as appointments and treaties. As a solution, "Mr. Madison moved to strike out the words 'each of which shall in all cases, have a negative on the other['] ; the idea being sufficiently expressed in the preceding member of the Article; vesting the 'legislative power' in 'distinct bodies'; especially as the respective powers and mode of exercising them were fully delineated in a subsequent article." *Id.* at 197 (footnote omitted). Madison's motion was adopted 7-3. Quite clearly all it accomplished was the avoidance of confusion whether certain stated exceptions to bicameral action were valid; it in no way suggested that the significance or scope of the bicameralism requirement was diminished.

[166] We agree with Congressional amici that the defensive purpose of the presidential veto was fulfilled by the President's opportunity to veto the NGPA in 1978. If the President believes the legislative veto is an unconstitutional encroachment on his authority, the appropriate time to object by veto is when the power is created—here, when section 202(c) of the NGPA was passed. That this veto may be overriden does not make it meaningless. The Framers specifically rejected proposals to give the President an absolute negative on Congress. If two-thirds of the House and Senate disagree that the legislative veto is unconstitutional, they may enact it over the President's veto.

We recognize the substantial obstacles to the exercise of a presidential veto against a one-house veto provision. For example, having lobbied so hard for national energy legislation, President Carter would have been hard pressed to veto

sents an exercise of the legislative power, then, it must be exercised only in compliance with these constitutional requirements.

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the NGPA because of its legislative review provisions, which were an extremely minor part of the statute. But Article I, Section 7's defensive purpose does not require more than that the President have an opportunity to veto legislation he deems unconstitutional.

This does not mean, however, that the President in any way waives his right to object to the legislative veto if he fails to veto it or if his veto is overridden. Such a "waiver" argument has been read into Justice White's statement that "the provision for congressional disapproval of agency regulations does not appear to transgress the constitutional design, at least where the President has agreed to legislation establishing the disapproval procedure or the legislation has been passed over his veto." *Buckley*, 424 U.S. at 286 (White, J., concurring in part and dissenting in part). *See also* Note, *Congressional Oversight of Administrative Discretion: Defining the Proper Role of the Legislative Veto*, 26 AM. U.L. REV. 1018, 1032 (1977). We prefer to read this passage as simply stating the obvious point that an attempt by one house to disapprove rules in the absence of statutory authorization would present a different issue from a one-house veto passed pursuant to effective legislation. To adhere to the waiver argument would require that one "believe that the Congress could pass a bill stripping the President of all his veto power over any subsequent legislation—which bill, if passed by two-thirds after presidential disapproval, would be entirely constitutional since, after all, the President had his opportunity to veto." *Oversight and Review of Agency Decisionmaking*, 28 AD. L. REV. 569, 691 (1976) (statement of Antonin Scalia). Such a result would ignore the fact that the presidential veto power ultimately inures to the benefit of the citizenry by acting as a check on the exercise of the plenary legislative power. *See* Gewirtz, *supra* note 82, at 78 n.129 ("[I]f a statute dilutes the President's veto power has not something gone awry in the constitutional system which no concurrence among the occupants of two political branches should be able to insulate from challenge?").

Judicial review of the constitutionality of legislative acts is independent of the presidential veto power. The Supreme

Congressional amici argue that Article I, Section 7 does not apply because FERC's Phase II rule was never an effective law, but merely a proposal to be accepted or rejected by Congress through the one-house disapproval mechanism. Since one house of Congress undoubtedly may refuse to enact proposed legislation, and may do so without the participation of the President, acceptance of this argument would end all constitutional inquiry. The policy purposes of Article I, Section 7 would be irrelevant. We emphatically reject this position, however, and hold that the veto of the Phase II rule effectively changed the law by altering the scope of FERC's discretion and preventing an otherwise valid regulation from taking effect. Accordingly, the Senate's concurrence and presentation to the President were necessary prerequisites to the effectiveness of the disapproval resolution.

The contention that the Phase II rule was a mere legislative proposal is easily refuted by comparing the status of the rule to that of a bill introduced in Congress. If neither house of Congress acts to approve a bill, the bill dies; but when neither house acts to disapprove an agency rule, the rule becomes law. Clearly the agency rule has some legal force that a proposed bill does not.[167] If Con-

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Court has never hesitated to find an unconstitutional encroachment on presidential authority simply because the President signed the statute at issue. *See, e.g., National League of Cities* v. *Usery*, 426 U.S. 833, 841 n.12 (1976) (noting that in *Buckley* v. *Valeo* and *Myers* v. *United States* the Court had struck down laws as unconstitutional encroachments on executive power even though the President had failed to veto them). The President remains free to challenge the constitutionality of any statute he or his predecessor signs, as, of course, are private parties.

[167] Indeed, there is a clear logical flaw in the argument that the effect of a veto "is as though a bill passed in one House and failed in another," *Buckley*, 424 U.S. at 285 n.30 (White, J., concurring in part and dissenting in part), which is made evident by considering the case of a two-house veto. If only one house disapproves a rule under that scheme, the

gress had wanted FERC merely to propose an extension of incremental pricing to be accepted or rejected by Congress, it could have so provided. FERC's Phase II pro-

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rule takes effect. Yet if the rule were merely a proposal whose underlying policy was never set by Congress, then one house's rejection should be sufficient to kill it. Clearly, then, the rule under a two-house veto scheme has more legal force than a legislative proposal. *Cf. Chadha*, 634 F.2d at 435 n.41 (argument that nonobjection of both houses changes the law is not applicable where review provision requires disapproval by both houses). And surely a rule issued pursuant to a one-house veto scheme cannot have a different legal status than a rule issued pursuant to a two-house veto scheme. We cannot believe, for example, that Congress intended rules promulgated by the FTC to have presumptive legal effect because subject to a two-house veto, *see* 15 U.S.C.A. § 57a-1 (West Supp. 1981), while intending FERC rules, which are promulgated pursuant to the same administrative process but subject instead to a one-house veto, to have no effect at all. This would imply that the two-house veto is more constitutionally suspect than the one-house veto because the former works to overturn an authorized rule whereas the latter merely rejects a legislative proposal. The obvious anomaly of this argument makes clear that it is untenable. *See Kilbourn V. Thompson*, 103 U.S. 168, 182 (1881) ("neither branch of Congress, when acting separately, can lawfully exercise more power than is conferred by the Constitution on the whole body").

In response it has been argued:

> [S]uch syllogistic reasoning ignores the basis for the constitutional distribution of legislative power. The Framers feared control of Congress by parochial legislative interests. When the proposals emanate from the President or his agents, however, that fear is unfounded: the President is presumed by the Constitution to act in the national interest. This presumption permits an executive proposal made pursuant to a congressional delegation of power, without a legislative veto provision, to become law even though the proposal might not have the majority support of either House of Congress. The source of the proposals, then, provides the safeguard against the dangers that bicameralism was instituted to avoid. Thus, a statute requiring one-House approval or two-House dis-

posal would then have become law only if approved by both houses of Congress and the President, or by two-thirds of each house. Instead, Congress provided that the Phase II rule could take effect as a valid agency action pursuant to a congressional delegation, though subject to disapproval by majority vote of one house.

Such a delegation is permissible because it was created by a statute enacted pursuant to Article I, Section 7. The delegation may be quite broad, so long as Congress performs "[t]he essentials of the legislative function," which are "the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct." [168] In other words, "there is no forbidden delegation of legislative power 'if Congress shall lay down by legislative act an intelligible principle'

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approval of executive proposals in a postenactment setting is functionally equivalent to the constitutional scheme.

Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455, 493-94 (1977) (footnote omitted).

It can safely be said that such an argument would have left most of the Framers stupefied. The idea that a "presumption" that the President will act beneficently is equivalent to the fundamental check of bicameralism conflicts totally with the pervasive theme that the only "presumption" is that there will be "a clashing of interests." 3 M. FARRAND, *supra* note 128, at 400 (statement of Mr. Dayton in the Senate, 24 Nov. 1803). Although the Framers feared legislative dominance, they labored under no belief that an unrestrained President would be any less dangerous. On the contrary, their decisive rejection of proposals to give him an absolute negative was based on the same view of human nature that led to restricting the Legislature to bicameral action subject to presidential veto.

It is also noteworthy that this argument on its own terms does not apply to independent agency rulemaking, as we have here, since the "proposal" does not come from the President. *See* Javits & Klein, *supra*, at 490.

[168] *Yakus* v. *United States*, 321 U.S. 414, 424 (1944) (Stone, C.J.)

to which the official or agency must conform." [169] An agency rule issued pursuant to such a delegation is binding and effective without action by either Congress or the President.[170]

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[169] *Amalgamated Meat Cutters & Butcher Workmen* v. *Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971) (three-judge court) (quoting *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928) (Taft, C.J.)).

[170] We recognize that in practice Congress will usually take some "action" when it determines not to veto a rule, as Judge MacKinnon argued in *Clark*, 559 F.2d at 685-90 (MacKinnon, J., dissenting). Judge MacKinnon's view appears to be that under a congressional veto scheme, the President is entitled to presentation of *both* a decision to veto, *see id.* at 689, *and* a decision not to veto, *see id.* at 690 (emphasis in original) ("In approving regulations submitted by the FEC *the concurrence of both houses is necessary*, since if one house disagrees, the regulations are killed. Hence, such regulations must be presented to the President.").

We disagree on this latter point. If Congress tries but fails to pass a statute to overturn an effective regulation, it certainly engages in "action." Yet there can be no argument that Congress' failure to pass a statute must be presented to the President for veto. In the same way, its failure to disapprove an agency rule does not constitute formal and official action invoking Article I, Section 7. Congress (or one house) "acts" for purposes of this provision when it affirmatively passes some bill, order, vote, or resolution that alters the substantive law; it does *not* act when such proposals are not adopted and the substantive law—i.e., the promulgated regulations—remain unchanged. To adopt Judge MacKinnon's alternative view would be to suggest that regulations promulgated under a two-house veto scheme with provision for presentation to the President would become effective only by the failure of both houses to disapprove, and only after the President had an opportunity to veto the regulations. Such a holding would empower the President to veto both regulations and disapproval of regulations, an unwarranted and illogical extension of his power under Article I, Section 7. The proper analysis, in our view, is that promulgated regulations become effective without further action by either Congress or the President.

An effective delegation, therefore, must embody some basic congressional policy decision. That policy decision, plus what the agency does in accordance with that decision, constitutes the law on the subject matter. We recognize that, due to the dormancy of the delegation doctrine, courts have frequently upheld extremely broad delegations giving little policy guidance to the administrators,[171] but the Supreme Court has never held that Congress may abdicate entirely its responsibility to make a policy decision when it authorizes agency action. Arguments that Congress actually decided nothing whatsoever about the extension of incremental pricing, therefore, would raise serious questions as to the validity of the Phase II delegation itself.[172]

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[171] *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 3.1-3.8 (2d ed. 1978).

[172] Congressional amici and intervenors argue strenuously that Congress actually decided nothing whatsoever about the extension of incremental pricing. *See* Brief for Congressional Amici at 65-66; Brief for Gas Suppliers at 46 ("[S]ection 202 contemplated merely a proposal which was to be reviewed by Congress"); Brief for Gas Consumers at 41 ("[N]o serious reading of the statute can support a conclusion that Congress pre-judged the issue"); Brief for PEG at 9 n.8 ("The decision on extending this rule under Section 202 was left to another day"). It unquestionably is true that Congress sought to avoid a definitive decision on extension of incremental pricing. But if, as these parties suggest, Congress was utterly neutral on whether such extension should occur at all, then a serious question would arise whether the delegation could be effective at all, unless we were willing, as we are not, to accept the view that the existence of a legislative veto can serve to validate an otherwise too broad delegation. *Cf. Chadha*, 634 F.2d at 431 ("We would be reluctant to view the statutory criteria of section 244 as so broad and indefinite as to permit constant legislative redefinition that at the same time does not amount to an effective amendment, for such a view would raise serious delegation problems.") Moreover, acceptance of Congressional amici's view would necessarily lead to the conclusion that the Phase II rule would have been a *new* policy

Moreover, in this case there is no question that Congress did set forth an original policy on incremental pricing, one which was reconsidered by the House in disapproving the Phase II rule. It may be true that Congress contemplated that it would make the final decision on extending incremental pricing after FERC issued a rule, but it is indisputable that Congress wanted FERC to do more than merely propose legislation. Section 202 of the NGPA represents an authorization, approved by both houses and the President, giving FERC discretion to issue an incremental pricing rule that would attain binding legal effect without further congressional action. The supporters of incremental pricing believed it an essential component of the gas deregulation compromise.[173]

The 1980 debates in the House make clear that the policy embodied in Title II and in the Phase II rule was being reevaluated in light of the limited experience under Phase I and the economic conditions that had developed since 1978. Representative Preyer commended the "vigorous rejection of a theory overrun by reality," [174] Representative Stockman stated that "our purpose today is simply to lay to rest by the agency of legislative veto a dubious regulatory experiment that has been overtaken by the rush of events and unanticipated developments," [175] and Representative Gramm added that "every argument that has been made . . . against phase II is equally applica-

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that could take effect without affirmative approval by either house and without any presidential participation. Since the Constitution clearly envisages all three entities combining to set national policy, such a construction would be just as constitutionally dubious.

[173] *See* pp. 26-29 & notes 60-67 *supra*.

[174] 126 CONG. REC. H3843 (daily ed. 20 May 1980) (remarks of Rep. Preyer); *see id.* at H3845 (remarks of Rep. Brown).

[175] *Id.* at H3848 (remarks of Rep. Stockman); *see id.* at H3849-50 (remarks of Rep. Levitas); *id.* at H3844 (remarks of Rep. Lundine).

ble to phase I." [176] Congressional amici themselves admit that in vetoing the rule the House was making "a social policy judgment," an "assessment that is peculiarly legislative in nature" because it is a "predictive assessment, using public participation and collective decisionmaking, with democratic accountability as the final test of judgment." [177] The only thing missing from this description is the crucial fact that the Congress had already made one judgment on this policy problem, and had agreed to allow FERC to formulate a rule that would go into effect without further congressional action. In taking its "second look" at the problem,[178] Congress undeniably engaged in a reconsideration of its previously enacted policy.

This is precisely the kind of decision that the Constitution envisions will be made only by both houses with the participation of the President through his veto power. The President and both houses of Congress agreed on a policy when they took their "first look." Undoing this policy requires adherence to the same procedure. The Senate's views on incremental pricing expansion were as critical as those of the House. If the Senate disagreed that the rule was undesirable, the two houses would have been in conflict whether incremental pricing should be halted, and the original authorization should have gone forward.

The same is true of presidential participation. Clearly the President's first opportunity to veto was not sufficient to cover the disapproval resolution; he had an opportunity to approve incremental pricing, to the extent

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[176] *Id.* at H3848 (remarks of Rep. Gramm).

[177] Brief for Congressional Amici at 43-45.

[178] 126 CONG. REC. H3841 (daily ed. 20 May 1980) (remarks of Rep. Sharp) ("We are using a legislative veto not as a way to discipline that agency, but as a way for us as I think [was] intended by the conferees on the 1978 act, to have a second look at the policy that we could not be certain of[,] that we were not willing to mandate at that time.").

adopted by FERC, but he did not have an opportunity to approve the abolition of extended incremental pricing, which is what the disapproval resolution effectively accomplished.[179] If, as Congressional amici contend, section 202(c) assigned to Congress "a single, discrete, well-defined role" of "deciding whether to expand a major experiment," [180] the President was entitled to participate in that decision. Otherwise, Congress has created a device which effectively expands the reach of its legislative power by permitting it to determine conclusively whether effective law is created or not.

It is true that a resolution of disapproval does not amend the statutory language and thus, to that extent, differs from enactment of a statute which obviously must comply with Article I, Section 7. But there is no question that the effect of a congressional veto is to alter the scope of the agency's discretion. In this case, the practical effect probably was to withdraw the discretion altogether; Representative Brown seemed justified in

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[179] Those who argue that an opportunity for presidential veto of the *regulations* is equivalent to an opportunity to veto the *disapproval resolution*, *see, e.g.*, Javits & Klein, *supra* note 167, at 483, 486-88, miss the crucial point that the presumption under a rulemaking statute is that the agency rule will take effect. The agency is authorized to formulate such a rule as it sees fit, in accordance with the statutory delegation. The President's power to "veto" a proposed rule of a subordinate official is thus inherent in the delegation itself. Once the agency decides on a rule, however, the rule may become effective law. A congressional attempt to stop the rule thus amends the original delegation. The President's opportunity to veto this disapproval—in effect to preserve the original delegation and prevent a change in the law—is a quite different thing than an opportunity to veto the rule, and one which the Presentment Clause seeks to protect by requiring concurrence and presidential approval or concurrence of a supermajority.

Here, in any event, the rule was issued by an independent agency, so the President was not given a chance to "veto" it.

[180] Brief for Congressional Amici at 47.

saying, "The overwhelming vote to disapprove phase II . . . should be a clear message to the FERC not to send up another incremental pricing rule." [181] In other cases, exercise of the legislative veto may enable one house of Congress effectively to dictate that a specific type of rule be promulgated. In either case, one house of Congress is enabled to enact a policy to which the other house and the President did not agree originally, a result that violates the requirements of Article I, Section 7.

It has been suggested that the nonobjection of either house is merely a condition precedent to the effectiveness of the rule, such that the rule never gains legal effect until the condition is satisfied.[182] This may describe

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[181] 126 CONG. REC. H3845 (daily ed. 20 May 1980) (remarks of Rep. Brown).

[182] *See, e.g., Atkins*, 556 F.2d at 1068; Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351, 364 n.109 (1978); Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323, 336-38 (1977). Primary reliance is placed on *Currin* v. *Wallace*, 306 U.S. 1 (1939), in which the Supreme Court upheld a statute giving the Secretary of Agriculture power to designate tobacco auction markets and inspect tobacco, on the condition that the affected farmers voted in a referendum to approve the program, and on *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939), in which the Court upheld a statute authorizing the Secretary to define milk marketing areas and propose marketing orders, which could go into effect only if approved by the affected parties.

It is argued that conditioning administrative decisions on approval of private groups certainly cannot be any more constitutionally authorized than conditioning administrative decisions on congressional approval. As one commentator has noted, "This is a non sequitur. . . . A delegation which disperses power is not necessarily constitutionally equivalent to one which concentrates power in the hands of the delegating agency." Watson, *supra* note 118, at 1067 n.430.

More important, the issues raised concerning the legislative veto simply would not be involved in a decision upholding a delegation to a private party:

the intent of Congress, but we do not find it relevant to a determination of the veto's constitutionality. Merely styling something as a condition on a grant of power does not make that condition constitutional. Otherwise Congress could, for example, provide that all rights and duties established by legislation are conditioned on the vote of either house of Congress to eliminate them, thus enabling instant repeal of all statutes by simple resolu-

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> A court decision to allow congressional delegation of power to private groups on grounds so unstructured yet conclusive, however bad as public policy, involves in constitutional terms solely a question of delegation doctrine. No other constitutional considerations come into play. Such a ruling could furnish no constitutional warrant for the quite different situation that is reached when, by a congressional veto device imposed on administrative authority, the Congress tries to blur or wipe out the constitutional prescriptions of article I, section 7 (regarding the scope of the congressional role in policymaking), and of article II (regarding the role of the Executive in executing statutes).

Dixon, *supra* note 82, at 455. These prior decisions regarding conditions placed on either statutory or administrative policies, therefore, are not relevant to this case, because they are of a different kind altogether.

In this regard, it is interesting that some supporters of the constitutionality of the one-house veto believe that the committee veto, whereby disapproval power is conferred on a single committee of one house, is unconstitutional. *See, e.g.*, Schwartz, *supra*, at 364 n.109. Yet if the constitutionality of the one-house veto is demonstrated by its status as a "condition," then the same would be true of the committee veto. The only reason the two possibly are different is that some conditions are unconstitutional. And that, of course, demonstrates why restyling the legislative veto as a condition is unhelpful. To accept the *Atkins* majority's finding that "[t]he doctrine of unconstitutional conditions is in no way pertinent to this case," on the ground that power over federal salaries is legislative rather than executive, *see* 556 F.2d at 1068, would be to make every conceivable delegation of disapproval power to some part of the Congress—even to a single congressman—per se constitutional.

tion. In effect, Congress could use "conditions" as a means of circumventing completely the stringent restrictions on the legislative power in Article I.[183]

It suffices here that in practical effect the House's veto changed national incremental pricing policy. FERC's Phase II rule was authorized to take effect without additional congressional action. The absence of such action cannot be equated with affirmative congressional action to alter the law.[184] Congress attempted to do by one house what the Constitution requires be done only by both houses and the President. Section 202(c) is therefore unconstitutional.

E. *Separation of Powers*

The one-house veto's violation of Article I, Section 7 is a sufficient basis for its unconstitutionality. Presumably, a legislative review mechanism permitting a rule to be repealed by a joint resolution presented to the President would present no constitutional problems. Even

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[183] It is worth recalling here that Clause 3 of Article I, Section 7 was adopted precisely to avoid congressional circumvention of Clause 2 by calling legislative action something other than a bill. *See* note 128 *supra*. It would thus be ironic if the decisive factor in determining the constitutionality of the legislative veto were whether it can fairly be termed a "condition." *See Separation of Powers Hearings*, *supra* note 138, at 252 (statement of Alexander Bickel) (Congress "has simply gone the long way around, and put the thing in another form of words about conditions and so forth, but it has done nothing different.").

[184] The article I authorization to make law does not permit positive law which alters the substantive legal rights of individuals to be enacted by a mere executive recommendation, which is not a final exercise of specifically delegated power to alter these legal rights, followed by legislative inaction—an inaction that could equally imply endorsement, acquiescence, passivity, indecision, or indifference.

*Chadha*, 634 F.2d at 435.

though such a device would still differ from enactment of a statute—since the statutory language would remain the same although the specific action was forbidden, and since a veto resolution is easier to adopt than an affirmative bill—the essential elements of the constitutional lawmaking process would participate. There would be neither an increase in total federal power nor a violation of separation of powers. Congress would be exercising power in a manner consistent with Article I.[185]

When Congress seeks to enable one house to exercise effective control over administrative decisions, however, the separation of powers principle comes into play. Petitioners contend that the one-house veto intrudes on the functions of the Executive and the Judiciary by permitting a single house of Congress to invalidate a rule on the ground that the exercise of discretion was either unwise or unlawful. Congressional amici respond that the House's veto did not intrude on the judicial power because the veto was based primarily on policy objections rather than a belief that FERC had violated its mandate. They also assert that there was no intrusion on the executive power because FERC is an independent agency not subject to executive control and that review of rulemaking is legislative rather than executive or judicial in nature.

We conclude that this one-house veto violated the separation of powers doctrine. The fact that FERC is not subject to presidential control does not entitle Congress to direct FERC's administrative decisions. The Supreme

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[185] We note, however, that the analysis might well differ in the case of agency adjudication rather than rulemaking. Legislative disapproval of an individual adjudication, even if voted by both houses with the President's approval or by two-thirds of each house, could create bill of attainder, due process, or equal protection problems. *See Chadha*, 634 F.2d at 435 & n.42; *cf. Pillsbury* v. *FTC*, 354 F.2d 952 (5th Cir. 1966) (congressional interference with adjudication violates due process).

Court has held that rulemaking is substantially a function of administering and enforcing the public law. As such, Congress may not create a device enabling it, or one of its houses, to control agency rulemaking. Congress' duty to oversee agency action is connected with its ultimate power of revising the laws under which the agency operates. The creation of further congressional power violates the Constitution.

1. *Meaning of separation of powers*

The most recent comprehensive statement on the separation of powers doctrine by the Supreme Court was in the *Buckley* v. *Valeo* per curiam opinion, the relevant portion of which was joined by seven Justices.[186] The doctrine of separation of powers "is at the heart of our Constitution." [187] There is common "recognition of the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another." [188] The fundamental purpose of this separation is to check the extent of power exercisable by any one branch of Government in order to protect the people from oppression. Justice Brandeis' famous quotation still stands as the most concise statement of this objective:

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the

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[186] 424 U.S. at 118-43. This portion of the opinion was joined by Chief Justice Burger and Justices Brennan, Stewart, Marshall, Blackmun, Powell, and Rehnquist. Justice White joined "much of" this part, but wrote separately. *Id.* at 257. (White, J., concurring in part and dissenting in part). Justice Stevens did not participate.

[187] *Id.* at 119.

[188] *Id.* at 120.

> distribution of governmental powers among three departments, to save the people from autocracy.[189]

It is also clear from *Buckley* v. *Valeo* that "total separation" was not contemplated: the Framers "viewed the principle of separation of powers as a vital check against tyranny," but "they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." [190] As a result, courts correctly have abstained from rigidly applying this principle to every apparent intermingling of power. It is false to reason from this, however, as have some supporters of the legislative veto,[191] that separation of powers is a mere theoretical construct with little or no practical significance. As the Court held, "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in

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[189] *Myers* v. *United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). The Ninth Circuit in *Chadha* argued that a second purpose of separation of powers *was* to promote efficiency by serving "to facilitate administration of a large nation by the assignment of numerous labors to designated authorities." 634 F.2d at 423. *See also* Brief for United States at 23-24. Such a "division of labor" certainly tends to enhance the efficiency with which various tasks are performed, though we have no doubt that the Framers intended this consideration to be subordinate to the concern for dividing powers to prevent tyranny. In any event, there is considerable doubt whether any efficiency is gained by enabling one house of Congress to strike down a rule promulgated pursuant to an orderly administrative process and to insert nothing in the rule's place. *See* p. 95 *infra*.

[190] 424 U.S. at 121.

[191] *See, e.g.*, Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367, 390 (1977) ("It is doubtful that the concept of separation of powers can really have any objective meaning.").

the summer of 1787." [192] Accordingly, the "Court has not hesitated to enforce the principle of separation of powers." [193]

2. *Intrusion into the executive sphere*

a. *Significance of FERC's independence*

Congressional amici argue that the House's veto of the Phase II rule by definition did not interfere with the Executive's administration of the statute because FERC is not part of the Executive Branch. The Commission is an independent regulatory agency "within the Department [of Energy]" for purposes of its budget, but functionally independent because its members "shall hold office for a term of four years and may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." [194] Since the Supreme Court has upheld the constitutionality of such agency independence,[195] Congressional amici argue that it is clear that the President can have no claim to participation in the making of FERC's rules: "FERC performs only those functions as assigned to it by Congress; it derives no independent authority from the Constitution, and separation of powers principles do not apply to it." [196]

The contention that the separation of powers doctrine does not apply to independent agencies is manifestly groundless. In *Buckley* v. *Valeo* the Supreme Court applied the doctrine to the Federal Election Commission

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[192] *Buckley*, 424 U.S. at 124.

[193] *Id.* at 123.

[194] 42 U.S.C. §§ 7171(a), (b) (Supp. III 1979). The Commission is also authorized to represent itself in court, as it has done here. *Id.* § 7171(i).

[195] *See Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935).

[196] Brief for Congressional Amici at 40-41.

("FEC"), an independent agency. It is true that the President, as representative of the Executive, does not have a claim to control the decisionmaking of independent agencies. But it is an enormous, and unwarranted, jump from this to the conclusion that Congress may itself interfere with an independent agency's decisions without regard to separation of powers. Although FERC is substantially independent of the Executive, it nonetheless performs executive functions. The constitutionality of agency independence has not turned on a determination that certain agency functions are properly legislative rather than executive in nature. *Buckley* held directly the contrary, finding that the FEC's functions represented "the performance of a significant governmental duty exercised pursuant to a public law. . . . These administrative functions may therefore be exercised only by persons who are 'Officers of the United States.'" [197]

We find, therefore, that the constitutionality of the one-house veto does not depend on whether it is used against an executive agency or an independent agency. There has been a general breakdown in any distinction between the functions of the two types of agency,[198] and in practice the interference by Congress is identical in either case. Indeed, it is ironic that Congressional amici attempt to place great significance on the Commission's independence and on the need for having a politically accountable check on the agency's decision. The fundamental justification for making agencies independent is that since they exercise adjudicatory powers requiring impartial expertise, political interference is undesirable.

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[197] 424 U.S. at 141.

[198] Executive agencies perform the same adjudicatory and rulemaking functions as do independent agencies. *See, e.g.*, 29 U.S.C. § 655 (1976) (Secretary of Labor shall by rule promulgate occupational safety and health standards). *See generally* K. DAVIS, *supra* note 171, at §§ 2:7-2:8; Nathanson, *supra* note 121, at 1099-109.

By then turning around and asserting that this independence is a justification for the one-house veto, Congress attempts simultaneously to decrease the power of the Executive and increase its own power.[199]

b. *Congressional disruption and control of the administrative process*

All parties agree that the particular decision made in this case by the House is best characterized as a general legislative policy decision. The key issue was whether incremental pricing should be extended at all, not whether the specific extension in the Phase II rule was the best one. Nonetheless, some congressmen were concerned that the specific rule issued by FERC was inappropriate,[200] and, more generally, it is clear that one-house review mechanisms such as section 202(c) may give Congress the power to control the agency's discretion in considerable detail. We therefore must consider whether the one-house veto permits Congress to interfere unconstitutionally with FERC's administrative discretion.

Many proponents of the constitutionality of the legislative veto concede that the one-house review mechanism may in some instances raise serious problems of interference with executive functions. Justice White, for example, stated that he "would be much more concerned if Congress purported to usurp the functions of law enforce-

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[199] *Cf.* Watson, *supra* note 118, at 1081 n.463 ("That a commission acts as an agent of the legislative department makes more emphatic the necessity that these bodies not be used as tools to give Congress a lawmaking role independent of the President.").

[200] *See, e.g.*, 126 CONG. REC. H3840 (remarks of Rep. Dingell) ("[T]he Commission's rule is seriously flawed"); *id.* at H3847 (remarks of Rep. Markey) ("FERC has caved in to industry pressure to write a rule of little effectiveness."); *id.* at H3854 (remarks of Rep. Ashley) ("I am convinced that the promulgation of the rule as currently constituted would be a serious mistake in public policy.").

ment, to control the outcome of particular adjudications, or to pre-empt the President's appointment power," than when Congress provides for legislative review of agency rulemaking.[201] This and similar views[202] rest on a belief that rulemaking is inherently a legislative, rather than executive, function. Seven Justices in *Buckley*, however, rejected this position in unequivocal terms:

> [The Commission's *rulemaking*, advisory opinion, and eligibility determination] functions, exercised free from day-to-day supervision of either Congress or the Executive Branch, are more legislative and judicial in nature than are the Commission's enforcement powers, and are of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress. Congress viewed these broad powers as essential to effective and impartial administration of the entire substantive framework of the Act. *Yet each of these functions also represents the performance of a significant governmental duty exercised pursuant to a public law.* While the President may not insist that such functions be delegated to an appointee of his removable at will, *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), *none of them operates merely in aid of congressional authority to legislate or is sufficiently removed from the administration and enforcement of public law to allow it to be performed by the present Commission.* These administrative functions may therefore be exercised only by persons who are "Officers of the United States."[203]

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[201] *Buckley*, 424 U.S. at 285 (White, J., concurring in part and dissenting in part).

[202] Javits & Klein, *supra* note 167, at 476-77; Nathanson, *supra* note 121, at 1087-88; Note, *The Constitutionality of the Legislative Veto*, 23 WM. & MARY L. REV. 123, 133-34 (1981).

[203] 424 U.S. at 140-41 (emphasis added) (footnotes omitted). Justice White characterized the FEC's rulemaking function as "purely legislative," but nonetheless concluded that this

In contrast, the Court did hold that powers "of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees," could be exercised by a Commission whose members were appointed by Congress.[204]

It of course is true that the specific holding of *Buckley* concerned the Appointments Clause of Article II, Section 2, Clause 2, and that here there is no specific clause forbidding the Congress from exercising rulemaking powers. Nonetheless, as the *Buckley* Court emphasized, Article II, Section 3 entrusts to the President, not to Congress, "the responsibility to 'take Care that the Laws be faithfully executed.' "[205] If rulemaking is sufficiently an executive function so that only Article II officers may conduct it, it would seem a fortiori that Congress is prohibited from substantial interference in the rulemaking process. It would be anomalous in the extreme to hold that Congress may not appoint the officials who make

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function had to be performed by Article II officers: "I know of no authority for the congressional appointment of its own agents to make binding rules and regulations necessary to or advisable for the administration and enforcement of a major statute *where the President has not participated either in the appointment of each of the administrators or in the fashioning of the rule or regulations which they propound.*" *Id.* at 281 (White, J., concurring in part and dissenting in part) (emphasis added). The tension in this argument is extreme. If rulemaking is an Article I function there is no reason why it must be performed by Article II officers. The only solution lies in *Buckley's* determination that rulemaking is substantially an executive function.

This holding in *Buckley* also demonstrates the error in the *Atkins* majority's assertion that "in exercising the delegated functions, the executive officer merely acts as an agent of the legislative branch of the Government." 556 F.2d at 1068. When the Executive acts to carry out laws passed by Congress, it remains a coordinate, not a subordinate, branch.

[204] 424 U.S. at 137.

[205] *Id.* at 138.

rules, but may enact a mechanism permitting effective congressional control over these officials' decisions.

Congressional veto proponents contend, however, that the one-house veto is simply one of many techniques Congress may use in carrying out its responsibility to oversee the administration of the laws. The error in this argument is that the one-house veto provides Congress with a fundamentally different kind of authority over administrative rulemaking than it otherwise would have. When Congress conducts investigations or hearings, or enacts a "report and wait" requirement,[206] or threatens to reduce appropriations, or imposes reporting requirements, or engages in other modes of oversight, its ability to influence the agency derives almost entirely from its ability to pass a statute requiring a different agency action or reducing the agency's appropriations. These oversight methods enable Congress to inquire "into *past* executive branch action in order to influence *future* executive branch performance." [207] Congress' supervisory power thus comes directly from its legislative power.[208]

The one-house veto, on the other hand, effectively enables Congress "to participate prospectively in the approval or disapproval of . . . law 'enacted' by the executive branch pursuant to a delegation of authority by

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[206] Under such a procedure, also known as the "laying system," the agency action must lay before Congress for a specified period before going into effect. The purpose is to give Congress an opportunity to pass a statute. Since there is no disturbance of the constitutional lawmaking process, the provisions present no apparent constitutional problems. *See Clark* v. *Valeo*, 559 F.2d at 648-49 & nn.5-6. *See generally* Watson, *supra* note 118, at 1060-61.

[207] Javits & Klein, *supra* note 167, at 461 (emphasis in original).

[208] Even passage of an opinion resolution declaring congressional intent is persuasive ultimately because of the implied threat of a statutory amendment.

Congress." [209] In effect, Congress is able to expand its role from one of oversight, with an eye to legislative revision, to one of shared administration. This overall increase in congressional power contravenes the fundamental purpose of the separation of powers doctrine. Congress gains the ability to direct unilaterally, and indeed unicamerally, the exercise of agency discretion in a specific manner considered undesirable or unachievable when the enabling statute was first passed. Not only does this expand the congressional power, but it may also expand the total national power. Because of the veto, the rulemaking agency is given greater power than Congress might otherwise delegate,[210] and Congress normally will let rules take effect unless so clearly undesirable that a veto is deemed warranted.[211]

Fundamentally, the argument for the legislative veto as a means of oversight comes down to a belief that the

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[209] Javits & Klein, *supra* note 167, at 462.

[210] *See* Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1427-28 (1977).

[211] *See* Watson, *supra* note 118, at 1073-74; Scalia, *supra* note 138, at 25-26. Alexander Hamilton, though not aware of the legislative veto possibility, succinctly described the pernicious results of allowing national policy to be easily made and easily altered:

> The internal effects of a mutable policy are still more calamitous. It poisons the blessing of liberty itself. It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man who knows what the law is to-day can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule which is little known and less fixed?

THE FEDERALIST No. 62, at 415 (P. Ford ed. 1898) (A. Hamilton).

existence of powerful and unaccountable rulemaking bodies demands that Congress have an efficient and effective means of control, i.e., that far from contravening the separation of powers doctrine, the one-house veto helps implement it. The empirical evidence suggests that legislative vetoes are not all that efficient in practice,[212] however, and this case presents an example of extreme disruption of the normal administrative process. FERC claims that it did not exercise its policymaking discretion because it believed that Congress wanted only a proposal to evaluate. Yet Congress appears to have delegated the Phase II issue in large part *precisely* to make use of FERC's policy expertise. The result was the agency assuming the bizarre position that it failed to exercise reasoned decisionmaking when it issued the rule.[213]

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[212] *See, e.g.*, Bruff & Gellhorn, *supra* note 210, at 1432-33 ("One obvious but important practical effect of the combination of congressional and judicial review is the increased potential for impasse. . . . Legislative vetoes, by placing Congress and the courts in similar roles, make possible a three-sided interaction, with heightened potential for delay, disruption, and unforeseeable results."); *id.* at 1438-39 ("To the extent that legislative veto authority allows special interests to achieve their ends by pressuring administrative agencies through congressional committees, such authority works to promote, rather than negate, faction.").

[213] When the agency has difficulty in determining its mandate, the value of the administrative process, with its guarantee of equal opportunity to participate by all interested parties, diminishes sharply. The agency may tend to ignore parties' submissions since it knows Congress ultimately will review the rule prior to its implementation. As a result, the attempt to enhance the political accountability of agency rulemakers may actually backfire as administrators view their roles as proposers of appropriate policy rather than final decisionmakers who must listen to and attempt to reconcile competing interests. *Cf. Chadha*, 634 F.2d at 431 n.32 (emphasizing "one danger inherent in departures from the rule of separation of powers: when a governmental power is exercised by a branch other than that ordinarily responsible, the

Moreover, if the legislative veto *is* an especially effective means of congressional control of administrative decisionmaking, then the separation of powers problem looms even larger. In arguing for the legislative veto, former Senator Javits wrote:

> In most situations, even when a clear consensus is present, it takes a long time for Congress to work its legislative will, owing, in large measure, to the various forms a single, affirmative, legislative remedy may take. A simple and unamendable resolution of approval or disapproval adopted pursuant to a legislative veto provision incorporated in an earlier statute, however, avoids the institutional delays and permits expedited postenactment review. In this characteristic, the legislative veto stands alone among congressional oversight techniques.[214]

This argument seems correct, but it fails to explain the need for a one-house veto. The delays in enacting an

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specific guarantees of governmental regularity applicable to the ordinarily responsible branch are in effect short-circuited."); Bruff & Gellhorn, *supra* note 210, at 1438 ("The congressional review process adds a second stage to rulemaking, one in which not all interested persons now participate, and in which not all interests receive equal attention.").

The one-house veto also increases sharply the negotiating power of individual congressmen or committees in seeking to direct administrative outcomes. The threat of a veto is much more plausible than the threat of a statutory amendment, making administrators more likely to succumb to congressional interference. Thus whatever the legal status of informal congressional interference with administrative decisionmaking, *see D.C. Federation of Civic Ass'ns* v. *Volpe*, 459 F.2d 1231, 1248-49 (D.C. Cir. 1971) (administrative exercise of discretion must be based on merits in accord with the statutory mandate, not on extraneous congressional pressure), *cert. denied*, 405 U.S. 1030 (1972), the one-house veto is significantly worse in this respect. *See Clark* v. *Valeo*, 559 F.2d at 682 (MacKinnon, J., dissenting).

[214] Javits & Klein, *supra* note 167, at 462.

affirmative and amendable legislative remedy are a result of nonconstitutional congressional rules of procedure which can be changed by Congress acting alone. If Congress chooses to use an unamendable resolution of disapproval as a means of expediting action, it may do so, *if* it acts by both houses and presents the resolution to the President. This would add little delay so long as there is a "clear consensus." To the extent there is *not* a consensus, the failure to act is not an undesirable "delay" but rather exactly the outcome of the legislative process envisioned by the Framers. The bicameralism and presentation requirements in Article I, Section 7 are not unfortunate by-products of a poorly designed scheme but rather carefully constructed impediments to the Legislature's exercise of power.[215]

The fundamental problem of the one-house veto, then, is that it represents an attempt by Congress to retain direct control over delegated administrative power. Congress may provide detailed rules of conduct to be administered without discretion by administrative officers, or it may provide broad policy guidance and leave the details to be filled in by administrative officers exercising substantial discretion. It may not, however, insert one of its houses as an effective administrative decision-maker.[216]

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[215] *See Myers* v. *United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting), *cited* at pp. 86-87 *supra*. *See also* Gewirtz, *supra* note 82, at 59 ("If Congress cannot agree on what it wants to accomplish, and cannot hammer out an agreement on the basic choices involved in an area, then there probably should be no law.").

[216] *See* Rehnquist, *Committee Veto: Fifty Years of Sparring between the Executive and the Legislature* 7 (12 Aug. 1969) (remarks of Assistant Attorney General before Administrative Law Section of American Bar Association) ("[T]he vice is that Congress not having chosen to [designate specific terms], and having delegated its authority to the Executive, it may not then control Executive exercise of this delegated power").

One final argument in favor of the legislative veto is that this increase in congressional power is necessary if "unbridled executive discretion is to be avoided, and the potential abuses of unfettered presidential power contained." [217] On this view, courts must recognize "that with the rise of the 'imperial presidency' some alternative must be devised if accountability on executive power is to be effected." [218] We refuse to accept the view that as a matter of constitutional law the Executive is too powerful and the Congress too weak. The great irony in this view is that there has been no usurpation of rulemaking power by either the President or unelected independent administrators. Their powers have come solely from congressional authorizations. If Congress has given away too much power, it may by statute take it back or may in the future enact more specific delegations.[219] It is one thing to agree that "[d]elegation of lawmaking power is a categorical imperative of modern government," [220] and quite another to conclude that because

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[217] Javits & Klein, *supra* note 167, at 497.

[218] Miller & Knapp, *supra* note 191, at 387.

[219] Congress also has numerous informal methods of overseeing agency action. *See generally* Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto"*, 32 AD. L. REV. 667 (1980).

[220] Schwartz, *supra* note 182, at 353. It has been argued that "consistent application of the view that the legislature cannot be empowered to disapprove a rule because disapproval is the exercise of a power to make laws would destroy the rulemaking powers of executive and administrative agencies themselves." *Id.* at 374. This is incorrect because it views the invalidity of the legislative veto as based on a "rigid separation-of-powers approach," *id.*, when in fact the crucial deficiency is not that Congress is engaged in lawmaking but that it does so by one house and without presentation to the President. And the problem with the one-house veto under the separation of powers doctrine is not that there is some intermingling of powers but that Congress substantially

Congress fails to constrain its delegations sufficiently to produce accountability, it may therefore insert itself into the administrative process. The power to cure the perceived problem lies entirely within congressional control both before it delegates power at all and after the administrators exercise their discretion.

Congressional unwillingness to use its constitutional powers cannot be deemed a sufficient reason for inventing new ways for it to act. As Justice Douglas wrote, "Legislative action may indeed often be cumbersome, time-consuming, and apparently inefficient," but that is not reason for interpreting the Constitution as conferring legislative authority on the President.[221] Similarly, the inefficiency of the Article I lawmaking process is no excuse for interpreting the Constitution to permit legislative participation in the administrative process. We indeed "pay a price for our system of checks and balances, . . . a price that today may seem exorbitant to many." [222] But if change is necessary, it must come either from a congressional reassertion of its right, and indeed responsibility, to provide meaningful standards for administrative action or from an amendment to the Constitution. The Constitution, with its principle of separation of powers, may be flexible, but it may not be changed by a judicial determination that its established procedures are no longer adequate.

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increases its total power by assuming roles that make the work of the other branches subordinate or irrelevant. Delegation of rulemaking power does not present this difficulty because the rulemaking entity is always subject to both the Judiciary and the Congress. If in practice the agencies have assumed a power that seems disproportionately large, then it may be time for the courts and Congress to reassert their unquestioned powers, respectively, to strike down undue delegations and to provide more specific delegations.

[221] *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 629 (1952) (Douglas, J., concurring).

[222] *Id.* at 633.

c. *Intrusion into the judicial sphere*

A final use of a legislative veto is to prevent the effectiveness of agency actions that exceed the statutory mandate. This was not a primary justification of the Phase II veto, but both the House's veto report and certain congressmen urged approval of the veto resolution on the ground that FERC's rule violated the congressional intent underlying section 202.[223] Petitioners urge that

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[223] *See, e.g.*, Veto Report *supra* note 9, at 11 ("The Commission's narrow interpretation of its authority under section 204(e) to set incremental pricing alternative fuel ceilings solely on the basis of installed alternative fuel capability and its perceived inability to tie delivered natural gas prices to natural gas wellhead market conditions appears to be a misreading of the statute."); 126 CONG. REC. H3847 (daily ed. 20 May 1980) (remarks of Rep. Markey) ("It is the clear intention of Congress in the incremental pricing provisions of the Natural Gas Policy Act to shield residential gas users and other high-priority customers from rapidly escalating gas prices for as long as possible. The rule before us today falls seriously short of this mandate."); *id.* at H3849 (remarks of Rep. Stockman) ("Clearly we now have before us a regulation, a proposed rule or program that was not intended, even by the authors of this provision when it was adopted in 1978,"); *id.* at H3854 (remarks of Rep. Ashley) ("[T]he thrust of the rule runs counter to the legislative history of the NGPA and to the intent of Congress.").

There is no doubt that legislative vetoes sometimes are based on a finding of violation of statutory intent. *See, e.g., Chadha*; 634 F.2d at 430 n.31 ("It appears that the House in this instance did view its action as a correction of a misapplication of the statutory criteria governing eligibility for exercise of the Attorney General's discretion."). Indeed, Congress has provided in some statutes that a rule may be vetoed *only* on this ground. *See* 20 U.S.C. § 1232(d)(1) (1976 & Supp. III 1979) (regulations issued by Secretary of Education may be vetoed by concurrent resolution only if "the final regulation is inconsistent with the Act from which it derives its authority"). *But cf.* Bruff & Gellhorn, *supra* note 210, at 1429 ("Although congressional review is often ostensibly based on legality, consideration of policy in a legislative body is inevitable.").

to the extent the veto was based on this ground, it unconstitutionally intruded upon the exercise of judicial powers by the courts. We agree.

The function of courts in reviewing agency action is to interpret the statutory delegation and determine whether the administrative decision is in compliance with that delegation. The problems that arise when one house of Congress assumes this role are clear. If one house vetoes a rule, the courts are prevented from exercising review, even though under prior decisions on the same statute, or on analogous statutes, they might have upheld the agency's exercise of discretion.[224] And if the rule is not vetoed, the courts are presented with a difficult question of how much weight, if any, to give to the implicit congressional finding that the rule represents a proper exercise of statutory discretion.[225]

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[224] As the *Chadha* court observed, the effect may be to render judicial interpretations of the statute mere advisory opinions. 634 F.2d at 430 & n.31.

[225] In some statutes, though not in section 202(c) of the NGPA, Congress has attempted to eliminate this problem by providing that failure to veto a final regulation "shall not represent . . . an approval or finding of consistentcy with the Act from which it derives its authority for any purpose, nor shall such failure to adopt a concurrent resolution be construed as evidence of an approval or findings of consistency necessary to establish a prima facie case, or an inference or presumption, in any judicial proceeding." 20 U.S.C. § 1232 (d)(1) (1976 & Supp. III 1979) (Department of Education regulations). *See also* 15 U.S.C.A. § 57a-1(d) (West Supp. 1981) (similar provision for failures to disapprove FTC rules). It is not at all clear, however, why failure to veto is not some evidence of compliance with congressional intent, if a decision to veto becomes a conclusive determination of a violation of congressional intent. In essence, Congress is conceding that its review cannot be systematic or thorough. Apparently it will veto only where it considers the statutory violation abundantly clear. Yet those cases are the ones where the courts should have the least difficulty making the same finding. This demonstrates a peculiarity inherent in the

Either way, the congressional review is entirely standardless and may be conducted without equal participation of interested parties.[226] If there is a dispute between the houses as to the statutory intent, the rule is defeated, and the interested parties are prevented from gaining a judicial interpretation. Moreover, the reviewing body—which in practice may well be a congressional committee—will inevitably look not primarily to the objective legislative intent at the time the statute was enacted, but rather to the "intent" at the present. This permits Congress effectively to alter the meaning of a statute as circumstances and the composition of Congress change over time.[227] Assumption of this power diminishes

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"statutory intent" justification for the legislative veto: it is unclear why it is necessary at all, since the courts are presently performing the precise function Congress now seeks to perform. *See Chadha*, 634 F.2d at 431 ("There is no indication that the Judiciary is incapable of determining whether the Attorney General has abused his discretion or applied a statutory standard improperly."). It is no answer to argue, as one former senator has, that the congressional veto is necessary to enable Congress to avoid "that institutional weakening which would result from constantly relying on the judicial process to protect its prerogatives." Abourezk, *supra* note 182, at 333. The limitation on Congress that results from restricting to the Judiciary the power to strike down executive actions is not something to be mourned, but rather is the very essence of separation of powers.

[226] This problem is clearly more severe in cases adjudicating rights of particular individuals, *see Chadha*, 634 F.2d at 430-31, 435, but applies to rulemaking as well. *See* Bruff & Gellhorn, *supra* note 210, at 1438; McGowan, *supra* note 82, at 1148-49.

[227] *See* Bruff & Gellhorn, *supra* note 210, at 1429-30 ("[W]hen Congress is unclear initially in forming legislative history, it is unlikely to contribute more than the agencies or the courts in later attempts to reconstruct it. Furthermore, the validity of a legislative purpose that is purportedly part of the law but not reflected in ordinary sources of legislative history diminishes as time passes and a new Congress with new members convenes."); Watson, *supra* note 118, at 1067.

the role of the Judiciary and expands that of Congress. Accordingly, it violates the separation of powers doctrine.

F. *Conclusion*

We are aware that our decision today may have far-reaching effects on the operation of the National Government. Yet this cannot deter us from finding the one-house veto unconstitutional. Congressional amici would have us, under the principles of flexibility and practicality in constitutional adjudication, approve an institutional structure whereby the administrative "experts" make policy and the people's representatives (without the President) are reduced to exercising a negative. This contravenes the constitutional procedures for making law. The genius of our Constitution, its adaptability to changes in the nature of American society, depends ultimately on the steadfastness with which its basic principles and requirements are observed. Otherwise its critical protections against governmental tyranny would quickly become meaningless, as the Government in power could shape it to suit whatever purposes seem sound at the present. The Article I restrictions on the exercise of the legislative power, as well as the principle of separation of powers, are fundamental to the constitutional scheme, and because section 202(c) attempts to evade them it cannot stand.

## VII. Proceedings on Remand

Intervenors urge that in the event we declare section 202(c) unconstitutional, the Phase II rule issued by FERC should not be ordered to go into effect. This is based on the view, argued by FERC itself, that the rule was not a product of reasoned decisionmaking and that FERC might well come up with a different rule after taking a close look at the situation. We have held, however, that FERC's attempted revocation of the rule, based on the alleged failure to engage in reasoned decision-

making, was invalid because FERC did not provide notice and an opportunity to comment.[228] The rule therefore shall take effect. To give the Commission an opportunity to reconsider the rule, however, if it decides this is necessary or if any party requests it to do so, we delay the effectiveness of the rule for thirty days from the date of our decision.[229] During this period the Commission may consider whether to amend the substance of the rule or, in order to provide time for sufficient consideration, whether to postpone the effective date further. If the proceedings are reopened, petitioners and all other interested parties must be provided with notice and an opportunity to comment on all issues raised. We express no views as to the precise scope of the Phase II delegation or the extent, if any, of the Commission's power to delay, amend, or revoke the rule.

*So Ordered.*

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[228] *See* pp. 31-36 *supra*.

[229] *Cf. Buckley*, 424 U.S. at 143 (providing 30-day stay of Court's judgment to "afford Congress an opportunity to reconstitute" the unconstitutional Federal Election Commission).

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 80-2184** **September Term, 1981**

Consumer Energy Council of America,
Consumer Federation of America,
and Public Citizen,

Petitioners,

v.

Federal Energy Regulatory Commission,
Respondent,

Process Gas Consumers Group, et al.,
Intervenors.

United States
Court of Appeals
for the District of
Columbia Circuit

FILED MAR 2 1982

GEORGE A. FISHER
Clerk

AND CONSOLIDATED CASE
No. 80-2312

BEFORE: Bazelon, Senior Circuit Judge; Wilkey and Edwards, Circuit Judges

**ORDER**

The Clerk is directed to file the motions of the United States House of Representatives, the United States Senate, and the United States for leave to intervene, and upon consideration thereof, it is

ORDERED, by the Court, that the aforesaid motions to intervene are granted.

*Per Curiam*

FOR THE COURT:

*/s/*

GEORGE A. FISHER
Clerk

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96TH CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPORT No. 96-938

# INCREMENTAL PRICING OF NATURAL GAS

MAY 12, 1980.—Referred to the House Calendar and ordered to be printed

Mr. STAGGERS, from the Committee on Interstate and Foreign Commerce, submitted the following

## REPORT

[To accompany H. Res. 655]

[Including Cost Estimate of the Congressional Budget Office]

The Committee on Interstate and Foreign Commerce, to whom was referred the resolution (H. Res. 655) disapproving the proposed rule under section 202 of the Natural Gas Policy Act of 1978 (relating to incremental pricing) transmitted to the Congress on May 6, 1980, having considered the same, report favorably thereon without amendment and recommend that the resolution do pass.

### I. PURPOSE AND BRIEF SUMMARY

The Natural Gas Policy Act of 1978 (NGPA) requires the Federal Energy Regulatory Commission to develop and submit to Congress, by May 9, 1980, a proposal for incrementally pricing natural gas sold to industrial nonboiler fuel facilities identified by the Commission. Incremental pricing under the NGPA mandates the allocation of a portion of the acquisition costs of natural gas to industrial boiler fuel users and requires the Commission, subject to Congressional review, to extend incremental pricing to such other nonboiler industrial users as it deems appropriate. The Commission submitted its incremental pricing proposal to Congress on May 6, 1980. The Commission's proposal will become effective unless it is disapproved by either House of Congress within 30 days (of continuous session) of its submission by the Commission. The purpose of House Resolution 655 is to disapprove the incremental pricing proposal submitted by the Commission.

### II. BACKGROUND

#### A. RECENT HISTORY PRIOR TO ENACTMENT OF NGPA

Until passage of the Natural Gas Policy Act of 1978 (NGPA), the existence of a price-controlled interstate natural gas market and an

uncontrolled intrastate market had contributed to increasing shortages of natural gas in interstate markets. As the disparity grew between the federally established price for gas and the higher unregulated intrastate market price, less natural gas was sold to the interstate market. Thus, the benefit of low cost interstate gas was offset by a distorted allocation of gas supplies and increasing curtailments of service to interstate customers.

In addition to relatively low costs for interstate natural gas, utilities maintained traditional policies of average cost pricing to their customers. Accordingly, customers did not have to face the true incremental cost of additional gas consumption, lacked incentive to conserve, and continued to demand more gas.

As demand exceeded supply and curtailments increased, industrial users in the interstate market who could not purchase adequate supplies of natural gas shifted to oil. Thus, existing regulation had led to low prices, excessive demand, and inadequate supplies for interstate natural gas markets.

During this period of interstate shortages, the Federal Power Commission began to examine the rates charged to end users of natural gas. The Commission found that: "* * * substantial amounts of natural gas are still being sold for industrial consumption at rates which understate both the cost and the value of the gas." The Commission also found that

> [t]he interstate industrial market demand, however, has been stimulated, and continues to be stimulated, by gas rates which are totally out of line with prices for alternative fuels and alternate gas supplies in the intrastate market and from supplementary sources, e.g., LNG, SNG and pipeline imports.

Natural gas rate design usually establishes a two-part rate structure wherein certain customers pay a "demand charge" based on how much gas they have a right to receive (whether or not any gas is received) and a "commodity charge" for each unit of natural gas received. The fixed costs of a utility system are recovered through both the demand charge and the commodity charge. If the commodity component of a two-part, demand-commodity rate contains too high a proportion of fixed costs, the resultant commodity rate may discourage industrial boiler fuel sales at rates low enough to compete with alternative fuels.

For years, the Federal Power Commission took the price of alternative fuels into consideration in designing pipeline rates to permit natural gas distributors to compete with alternative fuels. The level of a given pipeline's commodity rate was a function of the price of competitive fuels in the pipeline's distributor's market area. This was accomplished by assigning a portion of the fixed costs normally assignable to the commodity component of the rate to the demand component. This made natural gas competitive with alternative fuels but severely limited the recovery of fixed costs from interruptible industrial customers who only paid the commodity rate for gas service. Two-part rate structures make it possible for distributors to sell substantial volumes of interruptible gas at prices only slightly above the commodity level of the two-part rate.

The President's 1977 national energy plan found that:

> Artificially low prices for some energy sources also distort interfuel competition. The artificially low price of natural gas, for example, has encouraged its use by industry and electric utilities, which could use coal, and in many areas has made gas unavailable for new households, which could make better use of its premium qualities.

The NGPA attempted to eliminate artifically low natural gas prices to certain industrial users.

B. NGPA

*1. Statutory Requirements*

The NGPA eliminated the distinction between the inter- and intrastate gas markets and set a course for the elimination of price controls for certain categories of gas production between the date of enactment and 1985. The elimination of price controls is accomplished by establishing several increasing price paths for different categories of natural gas production.

Through its incremental pricing provisions, the NGPA requires that a portion of these increased gas prices be passed through first to industrial users. The NGPA requires the Commission to prescribe a rule for implementing incremental pricing. Each interstate pipeline is required under the rule to place certain portions of its acquisition costs of natural gas into a special incremental pricing account for passthrough to incrementally-priced users.

A two-stage process is utilized for identification of users who will be subject to incremental pricing. First, the Commission is required to develop a rule within 12 months after the date of enactment for implementation of incremental pricing applicable to certain industrial boiler fuel facilities. Second, the Commission is required to develop an amendment to this first rule, within 18 months after the date of enactment, for implementation of incremental pricing to other industrial users. This amendment to the first rule must be submitted to Congress for review. The amendment becomes effective unless disapproved by either House of Congress. If the amendment is disapproved, the Commission may submit a substitute proposal for review under the same procedure not sooner than 6 months after the last Congressional disapproval or later than 2 years after the first Congressional disapproval.

The NGPA provides a statutory exemption from both rules for any residence, school, hospital, or similar institution, for any electric utility, and for certain industrial cogenerators. In addition, small industrial boiler fuel users and certain agricultural users are excluded from both the first rule and the amendment. The Commission is authorized to propose other exemptions from the first rule and the amendment. If proposed, any exemption is subject to Congressional review and veto by either House of Congress.

*2. Operation of Incremental Pricing*

Incremental pricing allocates a specified portion of the acquisition costs of natural gas to certain industrial users. Incremental pricing operates in this fashion: all the money that an interstate pipeline

pays for different categories of natural gas in excess of certain specified "threshold" levels—which vary from category to category and increase from month to month—are added together and assigned to a special account. The amount of money in the account is recovered from the pipeline's distribution company customers by use of a surcharge mechanism according to the amount of gas the distribution companies sell to industrial customers subject to incremental pricing. The gas distribution company, in turn, is required to increase the rates to its industrial customers subject to incremental pricing, to recover its payment to the pipeline. The incremental pricing surcharge, however, may not increase the price of gas to industrial users above the alternative fuel price established by the Commission. If a gas distributor is unable to pass through his entire surcharge because his incrementally priced customers are already paying the alternative fuel price, the surcharge is reduced to that distributor and increased to the remaining distributors on the pipeline system whose industrial customers can absorb additional costs because they are paying less than the alternative fuel price. When all incrementally priced industrial facilities served by a pipeline reach equivalency with the alternative fuel price, amounts in excess of that necessary to keep those customers at equivalency may be allocated in whatever manner by which the pipeline and distribution companies are permitted to recover normal costs.

The Commission was given a certain degree of flexibility in implementing incremental pricing in determining the level of the alternative fuel price. The alternative fuel price may be set by the Commission at any level between the cost of No. 2 and No. 6 fuel oil.

### C. PURPOSES OF INCREMENTAL PRICING

Incremental pricing was designed to restrain the prices paid by pipelines for natural gas supplies, particularly after deregulation, and to protect residential consumers from higher prices resulting from deregulation.

Incremental pricing was designed to act as a market ordering device by imposing a restraint on the prices pipelines are willing to pay for gas supplies. Without incremental pricing, it was believed that the ability of gas-hungry interstate pipelines to average in comparatively small volumes of deregulated supplies of new gas with far greater volumes of cheaper old gas would result in bidding wars between pipelines for new gas supplies, which would be further exacerbated by current pipeline rate regulations which tie profitability to throughput volumes. Thus, it was believed that the price of deregulated gas would be bid to excessively high levels as pipeline managers sought to maximize throughput volumes and, thereby, pipeline profits.

Incremental pricing attempted to solve this problem by focusing initial price increases on industrial users served directly or indirectly by interstate pipelines. Accordingly, it was believed that pipelines would be encouraged by their industrial customers to use restraint in bidding for additional supplies of gas. By allowing the delivered price of these customers' gas to rise to the alternate fuel price, it was believed that incremental pricing would force pipelines to bid re-

sponsibly for supplies of gas or face a loss of industrial customers and an associated reduction in throughput volumes and profits.

Incremental pricing was designed to protect residential gas users from initial wellhead price increases by initially imposing the burden of price increases on industrial users of natural gas and by allowing the Commission to use an alternative fuel price ceiling less than No. 2 fuel oil if necessary to prevent increases in rates to high priority customers.

### D. COMMISSION INCREMENTAL PRICING ACTIONS UNDER PHASE I

First phase implementation regulations were issued by the Commission on September 28, 1979. The first phase of incremental pricing went into effect on January 1, 1980. This first phase specified that industrial boiler fuel users would be subject to incremental pricing up to the price of No. 2 fuel oil, low sulfur No. 6 fuel oil, or high sulfur No. 6 fuel oil, depending upon which fuel the industrial facility is capable of burning and is permitted to burn by State and local authorities.

As part of the implementation of the first phase, however, on October 9, 1979, the Commission transmitted to Congress a proposed temporary 10-month exemption of industrial boiler fuel users from incremental pricing above the price of high sulfur No. 6 fuel oil. This exemption was not disapproved by either House of Congress. In an order issued by the Commission on May 7, 1980, the Commission submitted for congressional review another exemption that would delay implementation of the three-tier ceiling for phase I for an additional year. Thus, not until November 1, 1981, will industrial boiler fuel users be subject to incremental pricing up to the price of No. 2 fuel oil, low sulfur No. 6 fuel oil, or high sulfur No. 6 fuel oil depending upon which fuel the industrial facility is capable of burning and is permitted to burn by state and local authorities.

### E. THE COMMISSION'S SUBMISSION TO THE CONGRESS: SUMMARY

The Commission's final rule submitted to Congress on May 6, 1980, includes all industrial users not exempted by the statute in the incremental pricing program, exempts the first 300 Mcf used each day and sets the ceiling price at the price of high sulfur No. 6 fuel oil. The complete text of the Commission's final rule appears in the appendix to this report.

## III. COMMITTEE CONSIDERATION

The Subcommittee on Energy and Power of the House Interstate and Foreign Commerce Committee met April 3 and May 6, 1980, to conduct hearings on the Commission's final rule implementing phase II of incremental pricing.

On May 6, 1980, House Resolution 655, a resolution of disapproval of the Commission's final rule, was introduced in the House.

On May 6, 1980, the resolution was placed before the Subcommittee and reported favorably by a voice vote. On May 7, 1980, the resolution was placed before the full committee for consideration and was reported favorably by a voice vote.

## IV. Committee Analysis of the Commission's Final Rule

### A. Introduction

The question of appropriate pricing strategy for natural gas in end-use markets is not trivial. A great many things are influenced by policies which have been set. Natural gas pricing decisions, therefore, should not be made with inadequate information, or prematurely.

At the point of end use, natural gas prices affect interfuel competition. Energy consumers—industries, businesses, institutions, and homeowners—make investment decisions on the basis of (among other things) current and expected prices and availabilities of natural gas and other fuels. The relative prices of competing fuels can have a very direct and strong bearing on investments and, therefore, on the long-term demands for each type of fuel.

Further, natural gas prices to end-use customers have impacts on virtually all sectors of the economy. Each sector (except transportation) is a significant user of natural gas and, at present, each sector pays quite different prices for its natural gas. Changes in these prices could have significant impacts throughout the economy.

### B. The Concept of Incremental Pricing

#### *1. The Necessity for Proper Price Signals*

The NGPA reflects a policy decision on how the costs associated with the NGPA and the deregulation of natural gas prices at the wellhead would be allocated between certain industrial and other basically high priority customers. The perception was that large industrial customers are the first to benefit from new supplies of decontrolled gas and that they should begin to pay the true costs of the extra supplies that they received. Indeed, the premise for deregulating certain natural gas prices was that to price domestic fuels below the costs of imported energy would disguise the real replacement cost of these resources, encourage waste, and contribute to our dependence on imported fuels.

The concept of incremental pricing was included in both natural gas pricing bills considered by the committee in the summer of 1977. Both H.R. 6831, which was ultimately adopted by the committee, and the Krueger-Brown-Wirth substitute contained incremental pricing requirements. Accordingly, the incremental pricing concept was perceived to be a necessary prerequisite to increased wellhead prices for natural gas.

The Commission's final rule endorses the need to provide proper price signals to end users. The Commission noted that:

> as long as gas prices are cost-based and reflect average ("rolled-in") historical costs of old contracts with low prices, the prices yielded by such a regulatory practice will not reflect the commodity value of the gas and, therefore, the price signals will not reflect the "true" value of the gas to society. More particularly, the Congress has explicitly made the fundamental social policy decision to redesign the system by which gas costs, in the past, have been allocated among user classes. The Commission regards the explicit reallocation sys-

tem embodied in title II as reflecting a Congressional determination going in the other direction—that rolled-in pricing produces unacceptable price shielding of industrial customers.

*2. Potential Threat of Price Instability in 1985*

The Commission's final rule finds that the record developed in its proceeding indicates that the wellhead price of deregulated gas purchased by interstate pipelines in 1985 "is likely to rise significantly". The Commission noted that

> natural gas markets may experience a substantial and potentially abrupt increase in delivered natural gas prices in 1985. The ability of our economic and political systems to withstand a sudden energy price "shock" of the dimension that might occur in 1985 will no doubt be a subject of further debate.

The Commission also found that its record on incremental pricing "does tend to underscore and support the concern that the Congress had in 1978 over the possibility of a disorderly transition to deregulation in 1985."

The Commission found that:

> If 40 percent of the flowing gas stream in 1985 is deregulated and moves up in price by roughly $3.00 from $2.90 per MMBtu to $6.00, then the average price impact on all flowing gas would be approximately $1.20 per Mcf in 1980 dollars. If more than 60 percent of all flowing gas in 1985 is deregulated and moves up by the same $3.00 increment, the average impact on all flowing gas would be closer to $2.00 per Mcf in 1980 dollars. Such changes would represent a 30 percent increase over anticipated residential rates that should be approximately $5.00 per Mcf (constant 1980 dollars) and a 40 percent real increase over industrial rates that will be in the $4.00 per Mcf range at year end 1984.

Even though the Commission's record indicated that the wellhead price of natural gas purchased by interstate pipelines was likely to rise significantly in 1985, the Commission testified that incremental pricing is a blunt instrument, one that is not very effective in either accomplishing the market ordering purpose or the price sheltering purpose. In addition, the Commission testified that these concerns must be addresed through mechanisms that are more refined and appropriate to the task than the tools provided to the Commission by the NGPA.

C. ISSUE PRESENTED

The Commission's goal in developing a phase II incremental pricing rule was to minimize the economic harm to non-exempt industrial users yet develop a program that would yield meaningful benefits to exempt users. The task before the committee was to determine whether the risk of economic dislocation in requiring certain industrial customers at this time to shoulder increased gas costs is outweighed by the benefits in sheltering higher priority users from some cost increases and whether an expansion of incremental pricing at this time is consistent with current national priorities.

D. CHANGED MARKET CONDITIONS AND THE QUESTION OF TIMING

Since the time of consideration and passage of the NGPA in 1978, energy market conditions have changed drastically and in unanticipated ways. During 1979, world oil prices doubled. U.S. oil prices started moving along a decontrol schedule. Significant savings of nearly all fuels were achieved in all sectors of the U.S. economy. These factors have a bearing on natural gas pricing. The motivation for expansion of incremental pricing at this time needs to be reassessed in light of these changed market circumstances.

Fundamentally, there is a question of timing. Do current market conditions support an expansion of incremental pricing beyond phase I?

Energy prices have increased substantially and demand has been falling for the past several months. In particular, consumption of No. 6 residual fuel oil has dropped considerably; as a result, prices for this particular product have fallen. Indeed, spot prices for residual fuel oil in New York harbor have fallen by almost $10 per barrel in the last 5 months and in some regions these prices are at or below the cost of natural gas to industry prior to any levy of incremental pricing surcharges. Thus, alternative fuel ceiling prices set by the Commission—under current market conditions—may actually prove to be declining while wellhead prices for natural gas are increasing. A technical, but important, factor adds to this awkward trend.

The Commission has chosen to tie incremental pricing surcharges to the price of No. 6 fuel oil. Calculation of the price of No. 6 fuel oil is done by the Energy Information Administration on a State-by-State basis. The basic information for this calculation is delayed in the reporting process by about two months. EIA takes available 2-month-old data and uses a "trend analysis", combining the old data with spot checks of more recent prices, to produce (by about the 10th of each month) alternative fuel ceiling prices for the following month. If residual fuel oil prices are falling, the trend analysis—if based on a period when residual fuel oil prices were rising or stable—will unavoidably calculate higher residual fuel oil prices and hence higher alternative fuel ceiling prices for next month than will actually occur. This inescapable product of delayed information could cause ceiling prices to be higher than actual No. 6 fuel oil prices.

This technical problem is occurring now. The effect could be a greater shifting of industrial gas users to cheaper No. 6 residual fuel oil than had been intended by the statute. When No. 6 residual fuel oil prices rise, the reverse problem would occur.

There are other reasons why an expansion of incremental pricing at this time is not warranted. The United States is experiencing unprecedented high levels of inflation and appears to be entering a relatively severe recession. Any unnecessary perturbations on the economy would run the risk of worsening an already difficult situation.

Further, the effects of phase I remain unresolved. The time since January 1, 1980, when phase I went into effect, has not been sufficient to determine its impacts. With that lack of information, there is little to go on in selecting an appropriate and productive plan for phase II.

The current softness of the oil and, to a lesser extent, natural gas markets together indicate that the current natural gas market is not disordered. The current surplus of natural gas leads to the conclusion that demand restraint mechanisms are not necessary. As demand increases, market-ordering functions may be needed.

E. SCOPE OF PHASE II

The Commission has acknowledged that the equities involved in determining the scope of phase II are exceedingly complex.

The Commission's final rule includes all industrial users not exempted by the NGPA in the incremental pricing program. Increasing the number of industrial users subject to incremental pricing reduces the price to high priority customers by postponing the date of spillover. The Commission found that a rule covering as broad a class of nonexempt industrial users as possible would best satisfy the objective of shielding high priority customers from price increases.

The Commission found, however, that the extension of incremental pricing beyond boilers to all industrial nonboiler uses of gas would not serve to accomplish the goal of ordering natural gas markets. The Commission accepted the view expressed by many that industrial end users who have little or no capability to switch to alternative fuels (i.e., most feedstock and process users) are in a relatively weak position to affect the prices that pipelines will pay for natural gas. In addition, by treating all industrial end uses of gas alike, the Commission's final rule penalizes superior end uses regardless of efficiency and necessity, and compels these superior uses to subsidize both exempt and nonexempt boiler fuel use.

Finally, the Commission rejected granting exemptions from the scope of phase II because it concluded that "any significant attempt by the Commission to fashion generic exemptions would be complex and inequitable and could eventually result in a hollow phase II rule that adds relatively little expansion to the program".

F. ALTERNATIVE FUEL PRICE CEILING LEVEL

The wellhead price decontrol provided for in the NGPA means that natural gas prices to industrial users will eventually increase to the price of alternative fuels even without incremental pricing. The Commission stated that many comments filed before it "anticipate the cost of gas could reach price equivalence with No. 2 fuel oil upon deregulation in 1985. It is the premature establishment of such prices by regulation rather than by the marketplace that appears most objectionable to industry". Market forces in a deregulated environment will value domestic natural gas in relation to some alternative energy source. The primary alternative is oil which, as the result of changed market conditions, is now priced considerably above the wellhead price path set out in the NGPA.

The underlying principle of incremental pricing was that certain industrial users should be charged prices that more closely reflect the commodity value of gas. By charging industrial users a price closer to that of fuel oil—a benchmark for determining the commodity value of gas—incremental pricing recognizes that natural gas regulatory pol-

icies have resulted in underpricing gas in relation to its commodit value.

Because of its form value, natural gas is considered to be our mos valuable fossil fuel. The high sulfur No. 6 fuel oil price adopted by th Commission in its final rule represents the minimum commodity valu of this precious fuel. Pricing policies which fail to reflect this minimur commodity value tend to encourage waste and subsidize imports. T the extent that industry is burning natural gas at delivered price which are to any significant extent below the price of No. 6 fuel oil, th cost of manufactured products and services are unlikely to reflect th true commodity value of their energy ingredients. Again, this encour ages waste and directly adds to our import dependency.

Committee hearings on this issue revealed a critical need for th Commission to provide administrative stability to the alternative fue price. Reference was repeatedly made to the adoption by the Commis sion of an administrative alternative fuel price mechanism that woulc not work because it was tied to a fuel price which is inherently volatile Considerable doubt was expressed whether thousands of industria users, 50 State rate commissions and all of the pipelines and distribu tion companies involved in this process, could keep up every month with the "yo-yo target" established by the Commission.

With respect to the alternative fuel price ceiling, the Commissior found certain limitations and inconsistencies in the structure of th statute. The Commission found that the threat of industrial load loss. which is necessary for market ordering to work, is present only if incre mental pricing can take the delivered price of industrial gas above the price of alternative fuels. Thus, the Commission found that the NGPA would not produce market ordering. However, this finding was based on the Commission's determination that the statute requires that the incremental pricing surcharge not result in a price for natural gas that exceeds each individual facility's alternative fuel cost.

In this connection, the Commission has suggested that its alternative fuel price mechanism is an unavoidable consequence of limitations im posed by title II. The Commission's final rule states that the NGPA places "a ceiling on incremental pricing surcharges such that the in dustrial incrementally-priced user's price cannot go above its alterna tive fuel oil price". Thus, the Commission said it did

> not believe that its discretion to set appropriate alternative fuel ceiling prices is a sufficiently broad grant of authority to permit incrementally priced user surcharges to be based upon the performance of the gas market rather than upon prices of alternative fuel oil.

The NGPA appears to give the Commission broader discretion in defining a facility's "alternative fuel cost" than has been embodied in the Commission's approach to phase II. At issue is whether section 204(e) of the NGPA requires that the Commission set a facility's maximum incremental pricing liability on the basis of its actual alter native fuel cost or whether, instead, section 204(e) merely gives the Commission a range of prices for establishing that facility's maximum incremental pricing liability. It appears that the latter is the proper interpretation of the effect of section 204(e). Appropriate alternative fuel price ceilings may be different from a facility's installed alterna tive fuel capability.

The economic efficiency or market ordering objective of incremental pricing may require that natural gas end user prices reflect natural gas wellhead market conditions. Title II contemplates dynamic interaction involving potential industrial load loss and a resultant restraining pressure on interstate pipelines bidding for deregulated gas. Such an interaction may not exist under a program where end user prices were decoupled from the gas producer market.

The Commission's narrow interpretation of its authority under section 204(e) to set incremental pricing alternative fuel ceilings solely on the basis of installed alternative fuel capability and its perceived inability to tie delivered natural gas prices to natural gas wellhead market conditions appears to be a misreading of the statute. Both the literal wording of section 204(e) as well as the broader context and purposes of title II may warrant a broader measure of discretion in setting incremental pricing ceilings than is reflected in the Commission's approach to title II.

With respect to the issue of the potential for industrial switching of gas to fuel oil, the committee received conflicting testimony. One exhibit on this issue was admittedly speculative. The Commission maintains that the market ordering objective of incremental pricing will not work because the limitation on the incremental pricing surcharge to equivalency with alternative fuels results in a price that is too low to cause fuel switching. Others, however, maintain that industrial gas customers will switch off gas onto fuel oil before price equivalency is reached. In addition, inadequate information has been presented to determine whether fuel switching results in the increased use of foreign oil or whether it only serves to move oil and natural gas into and out of different sectors of the economy without any beneficial effect on the nation's oil import dependence.

### G. MARKET ORDERING

The Commission's final rule concluded that,

> [d]espite the need to achieve an orderly transition from regulated to deregulated gas markets, the incremental pricing program as specified by Title II of the NPGA does not appear to generate the type of demand restraint that Congress sought.

The Commission based its conclusion on four factors:

First, the Commission found that industrial customers who have little or no capability to switch to alternative fuels are in a relatively weak position to affect prices that pipelines will pay for natural gas. In addition, although some conservation may be achievable by industrial users without fuel switching capability, the Commission determined that conservation efforts "are likely to be too gradual, indirect, and difficult to measure for these effects to have significant short term influence on pipeline gas purchasing decisions".

Second, the Commission found that interstate pipelines apparently are unwilling to view the short-run threat of unmarketability to their most price sensitive customers as a deterrent to acquiring high priced natural gas.

Third, the Commission found that certain independent actions by the States in increasing rates to their industrial customers jeopardized

the market ordering aim of incremental pricing. A number of Stat have begun imposing their own incremental pricing plans. Under the plans, industrial uses are priced up to the ceiling price, thereby elin nating all surcharge absorption capability in the State. Thus, custor ers in States without such plans will absorb more than a pro ra share of incremental pricing surcharges, absorbing surcharges th would be otherwise borne by industrial users in States having adopte plans. In some cases, where a pipeline system serves a number o States with their own incremental pricing plans, higher proportion of the surcharge account would have to be absorbed by all of the pip line's customers because the ceiling price would be reached by none empt industrial users in the remaining States, causing the unabsorbe surcharges to spill over to all customers under the pipeline's PG clause. The result could be an arbitrary and inequitable application o Federal incremental pricing.

Fourth, the Commission found that certain "limitations and in consistencies in the structure of title II itself" prevented adequat market ordering. More specifically, the Commission determined tha because incremental pricing does not force industrial users above thei individual alternative fuel ceilings, industrial users who reach thei ceiling will become indifferent to subsequent increases in wellhea prices of gas because the full increase would be borne by exemp rather than by incrementally priced users. The effect of the Commis sion's interpretation of title II is to insulate industrial users fro wellhead price increases which occur following spillover.

The Commission determined that the motivation for limiting incre mental pricing to the price of alternative fuel oil is the apparen congressional intent to avoid industrial load loss. The Commissio found that the consequence of this policy appears to conflict directl with the market ordering objective of the statute insofar as incre mentally priced users are insulated from price increases above thei alternative fuel price after spillover occurs.

### II. PRICE SHIELDING

The Commission concluded that a broad phase II rule combined with a moderate alternative fuel price ceiling would partially shield residential and other high priority users from the wellhead prices fo natural gas allowed by Title I of the NGPA. To the extent that incre mentally priced users absorb more gas prices, the amount of total costs remaining to be recovered from exempt users will be reduced. Thus, the Commission found that the costs of gas to residential and other exempt users would be lower as a result of the implementation of incre mental pricing. It should be remembered that in addition to residen tial users, the protected class includes nonindustrial boiler fuel users.

The Commission has estimated that its final rule would reduce resi dential and all other exempt users' gas costs by about 8 cents per Mcf. Thus, a residential customer consuming 130 Mcf a year might save about $10 per year as a result of phase II.

### I. ECONOMIC EFFECTS OF PHASE II

The economic effects of the Commission's final rule are proportional to the incremental pricing surcharge. The surcharge is the difference

between the alternative fuel ceiling price chosen by the Commission and the natural gas price to any industrial nonexempt user prior to implementation of any incremental pricing surcharge. For May 1980, the average alternative fuel ceiling price was equal to or slightly below the average industrial natural gas price. Thus, the Commission's final rule would currently have little or no effect on the economy. This phenomenon results from depressed residual fuel oil prices. As residual fuel oil prices rise, the surcharge amount will increase. Since the price path of No. 6 fuel oil is uncertain, the economic effects of Phase II are also uncertain.

Assuming that all gas subject to Phase II was surcharged at $0.60 per Mcf, the Commission found that the aggregate surcharge would amount to $698 million per year. This figure represents a high estimate, which is not likely to be attained soon because of the current depressed residual fuel oil market. This aggregate cost estimate might better be considered reflective of calendar year 1981, assuming that residual oil prices rise by year-end 1980 to levels experienced in year-end 1979. A rough measure of aggregate phase II impact can be gained by noting that the aggregate surcharge would be spread over approximately 9 Tcf of interstate gas consumption for exempt uses. The result is a price reduction of about 8 cents per Mcf for these exempt volumes. Thus, the average residential customer consuming 130 Mcf per year might save about $10 per year as a result of phase II. This is in addition to an approximately $8.00 per year savings under the phase I program if average surcharges equal $0.60 per Mcf.

There is considerable disagreement with respect to the inflationary impact of incremental pricing. A study performed by Wharton Econometric Forecasting Associates found that incremental pricing would be inflationary. The Department of Energy performed a macroeconomic analysis of incremental pricing utilizing the same set of input assumptions as Wharton and found that incremental pricing would not be inflationary. After reviewing both studies, the President's Council on Wage and Price Stability found that the short-term effects of phase II would be either negligible or anti-inflationary. The Commission concluded that the case for a large inflationary impact for phase II must be regarded as speculative.

### J. COMMITTEE FINDINGS

The committee finds that acknowledged uncertainty, current circumstances, and problems raised by the Commission's alternative fuel price mechanism preclude the implementation of this rule.

Throughout its final rule, the Commission repeated that it was uncertain about various aspects of its proposal. The Commission specifically stated that "[i]t would be desirable to have more knowledge and experience with incremental pricing before issuing a phase II rule." Adequate knowledge of the operation and effects of phase I of incremental pricing is currently lacking. Accordingly, more than a brief period of experience with phase I of incremental pricing should be developed before pursuing Phase II. Nevertheless, the Commission stated that, in accordance with the NGPA which gave the Commission 18 months in which to issue its decision, it would act now "even in the face of acknowledged uncertainty". Accordingly, the committee finds that current uncertainties with respect to phase II of incremental pric-

ing must be substantially reduced before it would consider implementation of a phase II rule. The committee accepts the Commission's determination that incremental pricing, as embodied in this rule, is ill-suited to accomplish market ordering or price sheltering.

Current market conditions do not support the need for an expansion of incremental pricing beyond phase I. Soft No. 6 residual fuel oil markets and the current surplus of natural gas leads to the conclusion that demand restraint mechanisms are not necessary at this time. In addition, the United States is currently experiencing unprecedented levels of inflation and may now be entering a relatively severe recession. Any unnecessary perturbations on the economy at this time would run the risk of worsening an already difficult situation. It is a risk the committee chooses not to take at this time. In addition, the possibility of load loss resulting from fuel switching or reduced industrial activity poses a risk to the economy that the committee is unwilling to accept.

The committee does not intend by its veto of the Commission's phase II rule to minimize the threat to natural gas markets posed by partial deregulation in 1985 or to influence in any way, either positively or negatively, the exercise of the Commission's discretion with respect to any market ordering option available to it. The committee notes that the Commission has made reference to other administrative measures available to it that do not require congressional approval to implement, such as the proposal to link alternative fuel ceilings to curtailment priorities and rate design initiatives to order natural gas markets.

Finally, the committee anticipates that the Commission will continue to monitor natural gas markets and will proceed to eliminate the uncertainties it has regarding incremental pricing. The committee requests that the Commission provide it with periodic evaluations of the need for market ordering actions.

## V. Changes in Existing Law

House Resolution 655 does not change any existing law.

## VI. Agency Reports

No formal agency reports have been received by the committee relating to House Resolution 655.

## VII. Cost Estimate

In accordance with clause 7(a) of rule XIII of the Rules of the House of Representatives, the committee estimates that no additional costs will be incurred as a result of the adoption of House Resolution 655.

## VIII. Information Submitted Pursuant to Rules X and XI

A. Pursuant to clauses 2(b)(2) and 4(c)(2) of rule X and clause 2(l)(3)(D) of rule XI of the House of Representatives, the committee states that no report has been received from the Committee on Government Operations respecting oversight findings and recommendations.

B. Pursuant to clauses 2(b)(1) of rule X and clause 2(1)(3)(A) of rule XI, no oversight findings and recommendations with respect to House Resolution 655 have been made by the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce.

C. Pursuant to clause 2(1)(3)(B) of rule XI, no new budget authority or new or increased tax expenditures are provided.

D. Pursuant to clause 2(1)(4) of rule XI, the committee concluded that the Commission's final rule probably would not be inflationary but emphasized that information available to the committee on this issue is conflicting and speculative.

Since the Natural Gas Policy Act of 1978 gradually decontrols wellhead prices of certain categories of natural gas, gas prices will rise. The inflationary impact of these increases can be minimized if higher prices to end users induce conservation, greater efficiency of gas use, or a switching to cheaper fuels. Phase II is designed to encourage these anti-inflationary possibilities.

However, a study performed by Wharton Econometric Forecasting Associates found that the increased cost of gas to industry resulting from Phase II would have a multiplier effect on the prices of goods and products and result in higher inflation. The Commission, the Department of Energy and the President's Council on Wage and Price Stability found that the industrial multiplier effect would not have a significant impact on inflation.

E. Pursuant to clause 2(1)(3)(C) of rule XI, the committee attaches the following cost estimate prepared by the Director of the Congressional Budget Office.

U.S. CONGRESS.
CONGRESSIONAL BUDGET OFFICE.
*Washington, D.C. May 7, 1980.*

HON. HARLEY O. STAGGERS,
*Chairman, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 2125 Rayburn House Office Building, Washington, D.C.*

DEAR MR. CHAIRMAN: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed House Resolution 655, a bill to disapprove the proposed rule under section 202 of the Natural Gas Policy Act of 1978, as ordered reported by the House Committee on Interstate and Foreign Commerce, May 7, 1980. The rule, proposed by the Federal Energy Regulatory Commission, would revise the incremental pricing regulations for natural gas.

Based on this review, it is expected that no significant direct cost to the Government would be incurred as a result of enactment of this bill.

Sincerely,

JAMES BLUM
(For Alice Rivlin, Director).

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## FERC ORDER

FEDERAL ENERGY REGULATORY COMMISSION

TITLE 18—CONSERVATION OF POWER AND WATER RESOURCES

CHAPTER I—FEDERAL ENERGY REGULATORY COMMISSION

PART 282—INCREMENTAL PRICING

(Docket No. RM80-10)

RULE REQUIRED UNDER SECTION 202 OF THE NATURAL GAS POLICY ACT

(Issued May 6, 1980)

Agency: Federal Energy Regulatory Commission
Action: Final Rule, Subject to Congressional Review
Summary: The Federal Energy Regulatory Commission hereby adopts regulations in accord with the directive of section 202 of the Natural Gas Policy Act of 1978 (NGPA). The rule is subject to Congressional review and will not become effective if disapproved by either House of Congress. If not disapproved, the rule will expand the scope of the incremental pricing program to all industrial end-users not exempt under the NGPA, and provide that those users of natural gas other than as boiler fuel be permanently subject to incremental pricing surcharges up to the price of high-sulfur No. 6 fuel oil.
Effective date: Such date as represents the ninety-first day following expiration of 30-day Congressional review period, if not disapproved by either House.
For further information contact: Alice Fernandez, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, D.C. 20426, (202)357-9095.

FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Charles B. Curtis, Chairman; Georgiana Sheldon, Matthew Holden, Jr., and George R. Hall.

Docket No. RM80-10

RULE REQUIRED UNDER SECTION 202 OF THE NATURAL GAS POLICY ACT OF 1978

ORDER NO. 80—FINAL RULE

(Issued May 6, 1980)

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## I. INTRODUCTION

Title II of the Natural Gas Policy Act of 1978 (NGPA) (Pub. L. 95-621) requires that the Federal Energy Regulatory Commission (the Commission) promulgate regulations to channel a specified portion of the increasing cost of natural gas to industrial users. The "incremental costs" of natural gas are to be passed through from interstate pipelines to industrial end users by means of a surcharge pricing mechanism.

Under Title II of the NGPA, the incremental pricing program is to be implemented in two phases. The first phase was implemented by regulations issued by the Commission on September 28, 1979 (44 FR 57726, October 5, 1979.[1] Under those regulations, only large industrial facilities that use natural gas as a boiler fuel are subject to incremental pricing.

Section 202 of Title II requires the Commission to promulgate a second phase (Phase II) rule by May 9, 1980, that amends the scope of the incremental pricing program to include other industrial users. Specifically, subsection (b) of section 202 provides that the second phase rule:

> shall apply with respect to the industrial use of natural gas (as defined by the Commission in such rule), including boiler fuel use of natural gas * * * by—
>
> (1) any industrial boiler fuel facility * * * and
>
> (2) any industrial facility which is within a category defined by the Commission in such amendment as subject thereunder to the requirements of such rule which is not exempt under section 206.

Section 202 also directs the Commission to submit the Phase II rule to Congress, which has reserved the right to review and disapprove this rule if it decides against extending the scope of the incremental pricing program.

On November 15, 1979, the Commission issued a Notice of Proposed Rulemaking providing for a broad Phase II expansion of the incremental pricing program.[2] This proposal derived from the Commission's review of the Congress' dual objectives in enacting the incre-

[1] The regulations issued on September 28 were contained in two dockets, Docket Nos. RM79-14 and RM79-21.

[2] Docket No. RM80-10; 44 FR 67170 (November 23, 1979).

mental pricing provisions. One objective is to prepare the natural gas market for deregulation in 1985. The second objective is to provide a measure of shelter to residential and other high priority customers from rising gas prices. The Commission then gave its preliminary view that "the Congressional purposes underlying incremental pricing would be most fully met if all industrial users, other than those specifically excluded by statute, are brought within the scope of Title II." (mimeo, p. 5)

In the Phase II Notice, the Commission also proposed to apply the "three-tier" system for determining the alternative fuel ceiling, which was developed for Phase I, to Phase II as well. In addition, the surcharge or flow-through mechanism developed for Phase I was proposed for Phase II. The Commission sought comment on these basic features as well as on several subsidiary aspects of its Phase II proposal.

Public hearings were held on the Phase II proposal in San Francisco, Salt Lake City, Chicago, Louisville and Washington, D.C. during the month of January; nearly 400 written comments were received.[3] Many fundamental questions were raised regarding both the specific features of the Commission's Phase II proposal and the ability of the overall incremental pricing program to fulfill its objectives. Those comments have played a major role in helping the Commission shape its Phase II submission to Congress. The final rule prescribed below responds in various ways to data, views, comments and criticisms of the rule proposed in the Commission's November 1979 Notice.

At the outset, the Commission wishes to point out that many comments suggested that it not develop any expansion of the program beyond what is already required by section 201 (Phase I). It was argued that the Congressional purposes underlying incremental pricing are misguided or that market conditions have so changed as to render the program inappropriate. The Commission does not accept this suggestion. The Commission believes that it was neither requested nor authorized to second-guess the social and economic judgments that the Congress made in enacting Title II. The role of the Commission under Section 202 is more limited. Instead, the Commission is instructed to bring its technical expertise to bear on the design of a workable Phase II rule that can best advance the purposes set by the Congress. It is up to the Congress to decide whether this Phase II submitted meets adequately the social and economic goals of the incremental pricing program or, indeed, whether those goals are still appropriate.

By virtue of the very review procedures built into section 202, it seems clear that the Congress sought to have this Commission develop a meaningful Phase II rule. The Congress would not have a meaningful choice if the Commission were to offer no rule, or a very narrow rule, for its review. The Congress has reserved to itself the fundamental judgment as to whether an expansion of incremental pricing is consistent with current national priorities.

The Commission believes that this Phase II rule presents a meaningful choice to the Congress. It proposes to broaden the scope of the incremental pricing program. On the other hand, it responds to the

[3] A full list of commenters is contained at Appendix A.

substantial body of comments that have urged the Commission to take a careful approach to Phase II and its attendant economic impacts.

### II. SUMMARY OF THE PHASE II SUBMITTAL

The Phase II rule approved by the Commission and submitted to the Congress would extend the incremental pricing program to all industrial users except those exempted specifically by the statute and would apply to all industrial gas consumption exceeding 300 Mcf per day. It also sets a uniform price ceiling for natural gas sold to industrial users at the price of No. 6 high-sulfur residual fuel oil.

An essential feature of the Phase II rule is that non-boiler fuel industrial users will be subject to incremental pricing only with respect to levels of consumption exceeding 300 Mcf per day. Thus, a facility using 400 Mcf per day of Phase II (non-boiler) uses would have 100 Mcf per day subject to incremental surcharges. For an industrial facility using 380 Mcf per day of natural gas as boiler fuel (a Phase I user), the entire 380 Mcf per day is surcharged, pursuant to the statutory provisions for incremental pricing of boiler fuel.

Another feature of the Phase II rule is that it would give states discretion to limit the impact of Phase II on individual users in order to ease any serious transitional burden. If, during the first year, Phase II would result in a surcharge of more than 75 cents per Mcf to any user, the state regulating consumption of that gas may allocate that portion of the surcharge exceeding 75 cents to other incrementally priced gas users within the state.

Technically, the Phase II submission would apply to all industrial "uses" other than those specifically exempted by statute. Gas straddle plants, which extract liquids from the gas stream, would be covered only with respect to net "use", or consumption, of gas as a fuel.

The Commission also recommends to Congress that the three-tier alternative fuel price ceiling approach under Phase I be postponed another year, until November 1, 1981. This specific action is submitted to the Congress for review pursuant to the general exemption authority of section 206(d). If the Congress agrees to this one-year exemption from higher prices for Phase I users, all users under both Phases I and II will have the same No. 6 high sulfur fuel oil ceiling through October 1981.

By the end of 1983, the Commission will review the impact of the incremental pricing program and evaluate what, if any, further changes would best advance the purposes of the program. The results of this review will be reported to Congress.

The final Phase II rule promulgated here will be submitted to the Congress by May 9. Either House has the statutory authority to veto the submission during the subsequent 30-day review period. If not disapproved, the Phase II expansion of the incremental pricing program will take effect 90 days after the Congressional review period has ended.

### III. BACKGROUND OF THE INCREMENTAL PRICING PROGRAM

The NGPA was enacted in 1978 to reform regulation of the natural gas industry and provide for phased deregulation of new natural gas.

Title I of the NGPA establishes incentive price schedules for variously defined categories of gas. Title I replaced a system of cost-based rates under the Natural Gas Act of 1938, which reached only to sales of gas in interstate commerce. The wellhead price of natural gas produced and consumed in the same state (so-called intrastate gas) was not subject to the Natural Gas Act. The NGPA changed the system dramatically by setting higher wellhead prices than had previously been allowed, and by also extending Federal price controls to previously unregulated intrastate sales. The maximum lawful prices set by Congress were substantially in excess of then-prevailing cost-based nationwide rates that had been set by the Federal Power Commission as regulated price ceilings.

Under Title I, the price of "new" natural gas will be deregulated on January 1, 1985. New natural gas is defined as production from wells spudded (drilling commenced) on or after February 19, 1977, which are more than 2½ miles from or 1000 feet deeper than the nearest old well. In addition, production from new development wells will be deregulated by 1987. Finally, NGPA price controls on most flowing intrastate gas will expire on January 1, 1985.

A. *Objectives of Title II Incremental Pricing.*—Title II of the NGPA, the incremental pricing provisions, were included by the Congress for two reasons. First, incremental pricing is designed to mitigate any disruption of the natural gas market that might occur upon deregulation in 1985. Many members of Congress, particularly those opposing sudden deregulation, feared serious disruption if deregulation were to occur during a period of supply and demand imbalance. The relatively low price of gas remaining under controls after 1984 was seen as providing an effective "subsidy" to pipelines willing to pay higher than long-run market clearing prices for deregulated supplies. Congress sought to eliminate this possible incentive for interstate pipelines to bid excessively high prices by initially increasing the price of gas delivered to large, price sensitive industrial customers to a level equal to the cost of their alternative fuel. Under this regime, Congress anticipated that pipelines, whose revenues depend upon volumetric throughput, would seek to minimize further increases in the cost of gas that might occur upon deregulation, for fear that industrial demand for natural gas (and therefore throughput revenues) would decline.

A second purpose of the incremental pricing provisions of the NGPA is to shield high priority gas users, such as residential users, from some of the scheduled wellhead price increases allowed by Title I of the Act. This shielding effect is accomplished by channeling to industrial customers a greater than pro rata share of rising prices paid by pipelines. The increased recovery of costs from industrial users results in an offsetting reduction in gas costs recovered from high priority users.

B. *Mechanics of Title II Incremental Pricing.*—The incremental pricing program consists of two sets of accounting rules. One set of rules relates to accumulation, at the pipeline level, of "incremental gas acquisition costs." The other set of rules allocates these incremental costs among industrial end users according to their "maximum surcharge absorption capability."

For each unit of gas purchased by an interstate pipeline, the incremental gas acquisition cost is defined as the price paid by the pipeline

minus a statutorily prescribed "threshold price" applicable to that gas. If a pipeline buys one MMBtu (million Btu's, or roughly one thousand cubic feet at standard temperature and pressure) of NGPA section 102 (new) gas at the present May 1980 ceiling price of $2.45/MMBtu, it then subtracts the May 1980 incremental pricing threshold of $1.78/MMBtu, which leaves $.67/MMBtu to be placed into the incremental gas acquisition cost account. The $1.78/MMBtu of cost at or below the incremental pricing threshold is placed into the pipeline's purchased gas account and is borne equally by all users. But the $.67/MMBtu in the incremental gas acquisition account is specifically channelled to users subject to the incremental pricing program. The more high-price gas a pipeline buys, the larger will be its incremental gas acquisition account.

At the same time that pipelines are computing monthly incremental gas acquisition costs, end users are computing their monthly maximum surcharge absorption capability (MSAC). A user's MSAC is defined as the estimated monthly consumption subject to incremental pricing multiplied by the difference between the applicable alternative fuel ceiling and its "base rate". The base rate is determined by the state or local agency having ratemaking responsibility for sales to industrial end users, and does not include the incremental pricing surcharge.

The overall incremental pricing program for a specific interstate pipeline then operates by comparing total incremental gas acquisition costs against aggregate MSACs. If aggregate MSACs exceed the pipeline's total incremental gas acquisition cost, then the entire amount of those cost is recovered solely from incrementally priced customers. During the initial stage of incremental pricing, all pipeine gas acquisition costs at prices above the incremental pricing threshold are "loaded" onto industrial customers. It is as if industrial customer end-use rates reflect one wellhead price while rates to residential and other high priority customers reflect a lower wellhead price.

But it is unlikely that aggregate MSACs will permanently exceed incremental gas acquisition costs on any pipeline system. This is because the size of the incremental gas acquisition cost amount tends to grow exponentially as both the amount of incrementally priced gas and the incremental costs associated with that gas will increase over time.

Eventually, the size of the incremental gas acquisition cost account will equal aggregate MSACs. At this point all incrementally priced users will be, by definition, at their alternative fuel price ceiling. Further increases in the incremental gas acquisition cost account would, if channeled to incrementally priced users, take them above their alternative fuel cost.

To avoid forcing these industrial customers above their alternative fuel cost and potentially driving them from the pipeline's natural gas system, both Title II and the Commission's regulations provide for "spillover" of incremental gas acquisition costs to all customers once incrementally priced users have all reached their alternative fuel ceilings. During this spillover stage, that portion of a pipeline's total incremental gas acquisition costs that exceeds its aggregate MSAC is placed into the system's purchased gas account and is recovered evenly from all customers.

These increases in pipeline purchased gas accounts due to spillover will normaly be passed on to all users regardless of whether they are subject to incremental pricing. But when these general cost increases reach incrementally priced users, they increase those users' base rates and thereby reduce their incremental pricing surcharges by reducing the difference between their alternative fuel price ceiling and their base rate.

Accordingly, once spillover begins, further increases in a pipeline's purchased gas costs are effectively borne completely by its exempt (non-incrementally priced) users. This subsequent loading onto exempt users occurs because the incremental pricing progam does not force industrial users above their alternative fuel ceilings. What happens during the spillover period is that each industrial user's MSAC and, therefore, its incremental pricing surcharge tend to erode due to increasing base rates. As far as incrementally priced users are concerned, further increases in pipeline gas acquisition costs reduce incremental pricing surcharges and MSACs but do not increase the overall delivered price.

When viewed from the perspective of residential and other exempt users, spillover signals the start of a temporary period during which they must bear 100 percent of further increases in pipeline gas acquisition costs, even though they may represent only 75 or 80 percent of the pipeline's customers. After spillover begins, the system effectively "loads" purchased gas cost increases onto exempt users until aggregate MSACs of incrementally priced users reach zero. This is referred to as the "catch up" stage.

Finally, the third stage of Title II incremental pricing begins when aggregate MSACs diminish to zero. At that point the incremental pricing system ceases to have any direct effect on user prices. The price of gas to industrial users may rise above the alternative fuel ceiling, but only because the base rate has done so. With incremental pricing surcharges equal to zero, incremental pricing has fulfilled the purpose of easing into higher gas costs, and the historical system of rolled-in pricing to all users resumes.

C. *The Phase I Incremental Pricing Program.*—Section 201 of Title II creates a mandatory incremental pricing program applicable to industrial boiler fuel users. The Commission's Phase I rules became effective on January 1, 1980.

The most difficult issue encountered by the Commission in developing its Phase I rules was deciding how to set the alternative fuel ceiling. The Commission recognized that too high an alternative fuel ceiling price could lead to inadvertent loss of industrial load. On the other hand, too low a ceiling price would render the program ineffective in shielding residential and other high priority customers from rising gas costs. These considerations led the Commission to adopt a three-tier alternative fuel ceiling approach.

Under the three-tier system, an industrial boiler fuel user's alternative fuel ceiling prime may be based on the price of No. 2 distillate fuel oil, No. 6 low sulfur residual fuel oil, or No. 6 high sulfur residual fuel oil. These three grades of fuel oil represent a wide range of prices, with No. 2 fuel oil significantly more expensive than No. 6 low sulfur fuel oil, which, in turn, is more expensive than No. 6 high

sulfur fuel oil. Each facility subject to Phase I would be permitted to use as its alternative fuel ceiling the lowest priced fuel oil that it has the physical capability and legal authority to burn.[4] However, in order to give the Commission time to put the program into operation and to avoid excessive impacts on any facility, the Commission proposed, and the Congress acquiesced in, a one-year moratorium on the upper two tiers until November 1, 1980.

A majority of States have taken action in response to the Phase I incremental pricing program that may bear on the Phase II program as well. Specifically, States have altered their end use rate schedules to set the price of natural gas to non-exempt (incrementally priced) users at the alternative fuel cost as referenced in the Commission's regulations and published each month by the Energy Information Administration of the Department of Energy.

Any State taking this action would "zero out" the entire maximum surcharge absorption capability of non-exempt users in the State and thereby eliminate all incremental pricing surcharges to these users. The effect of this action on the part of any State is to cause the entirety of increased revenues collected from non-exempt users to remain within that State. This result is different from what would occur under the Commission's rules, which operate at the interstate level. Under Federal incremental pricing, incremental surcharges paid by non-exempt users in one State would contribute to a reduction in the amount of purchased gas costs to be recovered from exempt users in all States served by the pipeline. So it is in the self-interest of a State which contains significant non-exempt industrial load to capture the increased revenues derived from those users for the sole benefit of exempt users within the State.

In a Notice of Proposed Rulemaking on Statewide exemptions from incremental pricing issued on December 21, 1979, the Commission responded to a number of inquiries as to the fairness and legality of this State action.

"In sum, the Commission believes that the Congress has already addressed and affirmed the substitution of State-level incremental pricing (through increased rates to non-exempt users) for incremental pricing at the interstate pipeline level. These considerations lead the Commission to a preliminary view that it should not, and legally cannot, prevent States from raising rates of non-exempt industrial users at or above the federally-prescribed and published alternative fuel cost." [5]

The Commission has yet to take final action on this and other issues in the Statewide exemption proceeding.

D. *Relationship of the Phase II Proposal to Phase I.*—The fundamental question that the Commission has addressed in its Phase II proceeding is whether the purposes of the incremental pricing program would be better advanced by a broader scope than is embodied in Phase I. The Commission's decision to propose a broad Phase II rule in its November 1979 Notice of Proposed Rulemaking originated from its view that an expansion would be consistent with both the market ordering and price shielding objectives of the program.

Phase I of incremental pricing covers approximately .8 to .9 Tcf,

[4] Legal authority, in this case, refers primarily to applicable environmental restrictions.
[5] Docket No. RM79-47, 45 FR 1081 (January 4, 1980).

or 7 to 8 percent, of annual interstate volumes. One argument originally offered by the Commission for expanding the program is that Phase I by itself might prove incapable of providing sufficient demand restraint to achieve market ordering in 1985.

"Phase I users are among the lowest priority users of natural gas; if heavily curtailed, Phase I users would no longer be in a position to affect their pipelines' bidding decisions. Under such circumstances, demand restraint could be achieved only through measures applicable to users of higher priority than industrial boilers." (mimeo, p. 9)

With respect to the objective of price shielding, the Commission in its November Phase II Notice anticipated correctly that under Phase I the maximum surcharge absorption capabililty of industrial boiler fuel users would be less than the amount of purchased gas costs subject to incremental pricing as soon as the rule took effect. Because all industrial boiler fuel users subject to Phase I are now at No. 6 high sulfur alternative fuel ceiling prices, high priority users are currently receiving the full amount of price shielding to be derived from Phase I with its single alternative fuel price ceiling. With Phase I users paying surcharges that have averaged about $.25 per MMBtu over the past few months, the benefit to high priority users has been about 2.5 cents per Mcf. For a typical gas-heating household using 130 Mcf per year, the benefit is approximately $3.00 per year. The Commission believed that the Congress intendeed a greater measure of price shielding, and so proposed a broad expansion.

Against this background of the purposes and operation of the incremental pricing program, the following section describes both the major themes expressed in the comments received on the Commission's proposed Phase II rule as well as the Commission's reaction to those comments.

## IV. PUBLIC COMMENTS AND COMMISSION FINDINGS ON THE PROPOSED PHASE II RULE

The Commission's Phase II Notice of Proposed Rulemaking has attracted considerable attention. The following discussion attempts to summarize the dominant themes contained in comments filed in this proceeding. The major themes deal with:

A. The timing of the Phase II Rule.
B. The scope of the Phase II Rule.
C. The alternative fuel price ceiling.
D. Market ordering.
E. Residential and other high priority price shielding.

A final section of this preamble, addressing economic impacts, also deals with a number of comments received on that issue.

Because of the number of comments, no attempt has been made to list in the text all those who commented on each theme. Instead, two or three comments representative of the many others will be cited. All comments and the major issues addressed by each are listed in Appendix A.

### *A. The Timing of the Phase II Rule*

The Commission received many comments suggesting that it delay promulgation of its Phase II rule. The American Gas Association and

Northern Petrochemical Company as well as others asserted as a threshold matter, that the Commission has the discretion to delay its Phase II rule. They noted that the Phase II rule under section 202 is, by its nature, merely an amendment to the Phase I rule under section 201. They also noted that section 201(a) provides for amendments to the section 201 rule "from time to time". They concluded that the section 202 rule is such an amendment and thus may be made from "time to time" and need not be issued by May 9, 1980.*

Many comments also suggested that the Commission should take a cautious approach, or, indeed, not implement Phase II at all. They suggested that Phase II is premature at this juncture and that further experience with Phase I as well as in-depth economic analyses are required for the Commission to make a reasoned decision on Phase II. Commenters such as Natural Gas Pipeline Company of America submitted that the Commission lacks sufficient data to make a decision now. They noted that 1985 estimated alternative fuel prices, market supply and demand, and other crucial factors are highly speculative at this time. Colorado Interstate Gas Company and others agreed and added their belief that there are so many other crucial incremental pricing rules pending, including small user, statewide, and agriculture exemptions, that the effects of Phase II are currently indeterminable.

Commenters' suggested schedules for implementing Phase II varied widely. Many simply suggested an indefinite delay. Mississippi Public Service Commission and Mississippi Valley Gas Company recommended indefinite delay and added that the Commission should rely on state regulation in the interim period. Others, including Congressman Tom Corcoran of Illinois, sought a delay until more information and experience is gained and all exemption rules are finalized. UGI Corporation urged a delay until the Department of Energy sends to Congress its PURPA section 306 report relating to end-use rate design for natural gas. Others were more specific and suggested delays from one up to ten years. Southern Nevada Industrial Customers suggested that the Commission promulgate the Phase II rule now but establish a much later effective date. Colorado Interstate Gas Company suggested that the Commission ask Congress for more time.

Other comments suggested various phased-in approaches. Ford Motor Company submitted that a phased-in approach with annual reviews will provide flexibility and avoid subjecting more companies to incremental pricing until large volumes of incrementally priced gas hit the market. Cast Metals Foundation suggested a gradual phasing-in at 20 percent of the affected industrials per year until all 100 percent are included in the program.

Few comments expressed favor towards an immediate rule expanding coverage. However, Congressman Dingell of Michigan and Boston Gas Company favored such an approach. Congressman Dingell stated five reasons why a Phase II rule is needed now: (1) industrials who wanted more gas supplies and are getting them now should pay their fair share for those supplies now; (2) industrials must be encouraged to conserve; (3) market disorders during the transition period before

* Ascard Inc., suggests that the constitutionality of section 202 is in doubt. Other forums are more appropriate for resolution of that question; the Commission's task is to carry out Congress' mandate.

1985 must be avoided; (4) businesses should be given time to plan for decontrol; and (5) the Commission should have the opportunity to fine-tune its program before 1985. Boston Gas made the point that the Commission may lack statutory authority to expand the program later on.

The Commission is sympathetic to suggestions that it defer Phase II. It would be desirable to have more knowledge and experience with incremental pricing before issuing a Phase II rule. But section 202, in the Commission's judgment, requires a rule to expand the program to industrial non-boiler fuel uses, and leaves no room for delay. It states:

"Not later than 18 months after the date of the enactment of this Act, the Commission *shall*, by rule, prescribe an amendment to the rule required under section 201 * * *" (italic added)

Any expansion of incremental pricing to industrial uses other than boiler fuel requires that a rule be issued on or before May 9, 1980. If disapproved by Congress, provision is made for submitting other Phase II rules. However, a failure to act now may legally foreclose the possibility of a later expansion of the program's scope, should it be decided that such would be in order.

The Commission is not persuaded by the comments of the American Gas Association, Northern Petrochemical Company and others that there is discretion in the NGPA to delay and expand the scope by later rulemaking. To interpret section 202 in relation to section 201 (a) in the manner suggested would obviate section 202. The Commission concludes that the language of section 201(a) authorizing amendments does not apply to amendments that seek to broaden the scope of the program, which are the sole consideration of section 202.

The section 202 rule is an amendment to the section 201 rule; but it is not the type of amendment contemplated by section 201(a). According to the Statement of Managers (page 96) section 201 "applies to industrial boiler fuel facilities only." Consequently, any amendment referred to in section 201(a) must relate to industrial boiler fuel use. In contrast, section 202 specifically relates to matters not covered by section 201. It calls for a single amendment to the section 201 rule and then only to add coverage to the rule. And section 206(d), which does permit certain amendments to the section 202 rule, only provides for exemptions to that which is already included.

Stated simply, the legislative scheme of Title II is that the Phase II rule delineates the maximum scope of the incremental pricing program. The Commission is of the opinion that once the Phase II rule is adopted, the scope of the incremental pricing program may be contracted but may not be expanded. It follows that in order to give Congress a meaningful Phase II option, the Commission must issue a Phase II rule by May 9, 1980, premised on the understanding that no statutory provision is made for a later expansion of that rule by the Commission.

The Commission must, therefore, act now, even in the face of acknowledged uncertainty, in order to carry out the Congressional intent that it be given a meaningful expansion of incremental pricing from boiler fuel to other industrial uses. A broad Phase II rule can always be followed by section 206(d) exemptions.

The Commission is also sympathetic to and has tried to respond to requests that all other statutorily required exemptions be finalized prior to making the Phase II rule effective. Final rules implementing the mandatory small boiler and agricultural use exemptions ore being issued simultaneously with this Phase II rule. But with respect to discretionary exemptions under section 206(d), the Commission is not yet in a position to commit to any broad exemption plan. The Commission is concerned that generic exemptions could become so numerous as to reduce the Phase II rule to a hollow shell. The only prudent course is to provide for the broadest possible program at this time. By doing so, in addition to preserving the scope of the program, the Commission will retain the opportunity to revise and adjust the program as knowledge and experience develop further. Furthermore, during the transition period before 1985, industry as a whole will be able to acclimate itself to scheduled deregulation. Thus, with this approach, a functioning incremental pricing program will be in place when deregulation occurs.

Accordingly, this Phase II rule applies to all industrial gas users. Because the Commission recognizes that industry must have an opportunity to gain an understanding of the Phase II rule and plan for its implementation, the effective date of the Phase II amendment shall be delayed to the maximum extent permitted by the Statute, which is 90 days after the Congressional review period has ended.

*B. Scope of the Phase II Rule*

The Commission's Notice of Proposed Rulemaking proposed to bring all industrial users, other than those specifically excluded by statute and except for those users who consume small amounts of gas, within the scope of the incremental pricing rule. A majority of commenters urged the Commission not to expand the scope of incremental pricing beyond the existing Phase I rule. Most asserted that the proposed broad Phase II rule utilizing a three-tier alternative fuel price ceiling would have disastrous effects on the economy and on their particular industries. These commenters forecast increased inflation and unemployment, fuel switching leading to increased dependence on foreign oil, plant closings, and other effects harmful to industry in particular and the national economy in general. On the other hand, some commenters argued that these forecasts of economic doom were exaggerated and that a broad Phase II rule would best implement Congressional purposes.

Many of the commenters urged the Commission to adopt a liberal approach to granting exemptions from any final rule of broad applicability. Pacific Gas and Electric Company, GTE Products Corporation, and Johns-Manville Corporation, among many others, urged the Commission to exempt uses of natural gas for which no reasonably feasible alternative fuel oil capability exists. Some industrial processes require controlled temperatures or clean flame characteristics which, it is suggested, can be achieved only with natural gas. Many feedstock uses require the particular chemical characteristics of natural gas. Many commenters argued that because of an absence of alternative fuel capability, they are "captive" users unable to switch fuels regardless of price and unable to conserve significantly without reducing production. These users argued that application of incremental pricing

to their operations would create economic hardship that would more than offset any direct benefit to exempt, high-priority users. Furthermore, some pointed out that most process and feedstock uses of natural gas are in fact defined as high-priority uses under Commission and state curtailment plans.

For similar reasons, several commenters, including Northern Illinois Gas Company, the American Iron Ore Association and Korf Industries, recommended that natural gas used for plant protection be exempt from incremental pricing. Ideal Basic Industries, Inc. urged the Commission to exempt gas use which is necessary for environmental or industrial safety reasons. Avery International suggested that gas used for mandated emission control devices should be exempt. Phelps Dodge Corporation argued that natural gas used as ignition fuel or for flame stabilization should be exempt. Milwaukee Solvay Coke Company urged the Commission to exempt gas used in mixtures of coke-oven gas.

Other commenters asserted that the national interest and economic considerations require that certain industries or classes of industries be exempt from incremental pricing. For example, Potters Industries, Inc. urged the Commission to exempt gas used to manufacture products which are particularly sensitive to competition from foreign imports. A joint comment from North Carolina concerns suggested that the Commission exempt all gas used to manufacture necessities such as food, clothing and shelter. Certain Teed Corporation urged an exemption for the insulation industry, the Cast Metals Foundation urged an exemption for the foundry industry, Sikes Corporation urged an exemption for the ceramic tile industry, the National Clay Pipe Institute urged the same for the clay pipe industry, Schenley Distillers, Inc. recommended an exemption for gas used in the production of anhydrous alcohol for gasohol, and Cabot Corporation urged an exemption for gas used to manufacture corrosion resistant alloys, high temperature alloys, and stainless steels. Other commenters made similar requests citing the national importance of their particular gas uses and the inability of their industries to pass on such cost increases as would occur should the Phase II rule be promulgated as proposed.

From the number and quality of the comments received in this proceeding, it is obvious that the asserted equities involved in determining the scope of Phase II are exceedingly complex. If the Commission were to exempt firms or industries without alternative fuel capability or on some other basis such as social need, national defense, or potential economic disadvantage, the exemptions would soon swallow the rule. To grant some of the requested exemptions and deny the rest could produce highly inequitable results. In order to provide Congress with a proposed rule that would significantly expand Phase I coverage, the Phase II rule must be broad in its application. The record indicates that any significant attempt by the Commission to fashion generic exemptions would be complex and inequitable and could eventually result in a hollow Phase II rule that adds relatively little expansion to the program.

The Commission is continuing to develop a meaningful yet equitable approach for the treatment of generic exemptions from the incremental pricing program. It is the Commission's belief that sec-

tion 206(d) provides the primary statutory vehicle for granting relief in the form of full or partial exemptions. Any exemption granted pursuant to section 206(d) must undergo Congressional review prior to taking effect, and the Commission believes the Congress, by inclusion of the section 206(d) mechanism in the NGPA, expressed a preference for reviewing exemptions from the program. Thus, the Commission intends to restrict its use of its adjustment authority under section 502(c) of the NGPA. Section 502(c) adjustments will be granted only in those cases where the most special of special hardship can be demonstrated or where a unique set of circumstances unequivocably warrants relief from incremental pricing.

The Straddle Plant Group and several individual natural gas liquid separation facilities argued that the natural gas they purchase should not be subject to incremental pricing. They argued that Title II should not apply because they do not "use" or "consume" all the gas that they purchase. Of the total volume of natural gas which enters a separation plant, most leaves in the form of natural gas, some leaves in the form of natural gas liquids, and the rest is consumed in the process. For example, 100 MMBtu's of gas may enter a particular separation plant. After processing, the gas stream that exits the plant will typically contain 80 MMBtu's of gas. Fifteen MMBtu's may be extracted in the form of natural gas liquids. Only the 5 MMBtu's of natural gas which is consumed in the process is incrementally priced under the Phase II rule below. This is not the result of a partial exemption. In the above example, 80 MMBtu's were returned from the plant in the form of natural gas supplies. Fifteen MMBtu's were separated from the gas stream but remained as useful energy supplies in the form of propane, butane and other natural gas liquids. Because the separation plant actually *uses* only 5 MMBtu's of gas, only the 5 MMBtu's would be subject to incremental pricing under Title II.

Most commenters strongly urged the Commission to continue the exemption for small users of both boiler and non-boiler fuel. The permanent exemption for small boiler users required by section 206(a)(2) of the NGPA will be promulgated in Docket No. RM80–24.[7] Also, a rule applicable to new, small boiler users will be adopted in Docket No. RM79–48.[8]

In the Notice of Proposed Rulemaking issued in this docket, the Commission proposed to exempt from incremental pricing those small users that did not consume more than an average of 300 Mcf per day (or the permanent threshold established in accordance with section 206(a)(2) of the NGPA, if lower) for non-boiler fuel use during any month commencing with May, 1980. Although the comments strongly supported this exemption, several commenters suggested modifications. Mississippi Valley Gas Company, Municipalities for Small Industrial Consumers, and Kyle Associates, among others, recommended that the threshold for the small non-boiler use exemption be set at 300 Mcf per day even if the threshold for the small boiler fuel use exemption is lower as a result of the 5 percent rule required by section 206(a)(2). Northern Natural Gas Company suggested that the small industrial's gas use be examined once a year to establish eligibility for

[7] See Notice of Proposed Rulemaking, Docket No. RM80–24 (March 6, 1980).
[8] See Notice of Proposed Rulemaking, Docket No. RM79–48 (September 28, 1979).

the exemption on an annual basis. Under such a procedure, a small user would not lose its exemption if gas use for one month exceeded 300 Mcf per day because of seasonal variations or unanticipated peak requirements. Northern Illinois Gas Company noted that the small non-boiler use exemption as proposed drew a harsh line. An industrial that uses more than 300 Mcf of gas per day has all of its gas subject to incremental pricing surcharges whether it uses 301 or 100,000 Mcf of gas per day. However, an industrial facility that uses 299 Mcf of gas per day is totally exempt. To relieve this harsh effect, Northern Illinois Gas Company and Koppers Company, Inc. urged the Commission to adopt a rule which would exempt the first 300 Mcf per day of non-boiler use for all industrial facilities. The Commission finds considerable merit in this approach and has made it a part of the Phase II rule.

Under the rule adopted by this order, a facility whose Phase II non-boiler uses average 300 Mcf per day or less during any month is totally exempt from incremental pricing (with respect to Phase II use) for that month. If a facility's Phase II use average more than 300 Mcf per day during a month, only those volumes consumed in excess of 300 Mcf per day are incrementally priced. Thus, a facility averaging 380 Mcf per day of nonboiler fuel use during a month would have 80 Mcf per day subject to incremental pricing surcharges.

The Commission believes that exempting the first 300 Mcf per day of monthly average use is a simple and equitable approach to the small non-boiler use exemption. Problems associated with establishing eligibility for the small user exemption as originally proposed are removed. A facility whose requirements fluctuate from month to month around the 300 Mcf per day level will face lower and more stable gas costs than would have been the case under the originally proposed small non-boiler use exemption. With the approach adopted herein, the impact of incremental pricing will, to a greater extent, be within the control of the small marginal user. For most facilities the increased costs should not be so high as to induce non-productive capital expenditures to install alternative fuel capability. Nevertheless, the increased cost of gas over the 300 Mcf per day average should provide an incentive for such a facility to conserve. The Commission believes that all of a user's natural gas consumption need not be incrementally priced to induce appropriate conservation efforts. Sufficient incentive exists if the marginal use is so priced.

In addition, the Phase II rule places a proportionally greater impact on large users. A facility that averages 2,000 Mcf per day of non-boiler use will have 85 percent of this gas incrementally priced; a facility that averages 600 Mcf per day of such use will have only 50 percent of the gas incrementally priced. Accordingly, the incentive to make conservation or conversion investments is greater for the large users who are more likely to find the absorption of such investments economically feasible.

Small user exemptions for boiler fuel use and non-boiler fuel use will be treated separately under an additive approach. Thus, a facility that in 1977 used an average of 250 Mcf per day as boiler fuel (Phase I use) and which uses an average of 400 Mcf per day in non-boiler (Phase II) applications would qualify for both small user exemp-

tions. Only 100 Mcf per day of the Phase II non-boiler fuel use would be subject to incremental pricing surcharges.

The only industrial non-boiler use of natural gas falling within the potential scope of Phase II that is excluded specifically excluded from this Phase II rule is pipeline compressor fuel. The cost of natural gas used as compressor fuel is treated as a general pipeline expense, to be recovered evenly from all customers. Because pipelines would be allowed to pass along the full increased cost of compression if such fuel were incrementally priced, there is no likelihood that the market ordering objective of incremental pricing would be advanced by bringing pipeline compressor fuel within the scope of Phase II.

Concurrently, incrementally pricing pipeline compressor fuel will not contribute to residential and high priority price sheltering, because all customers would pay for the increased cost of compression. The purposes of Title II have, throughout the course of this proceeding, served as the Commission's guide. In the case of pipeline compressor fuel, this guide has led the Commission to the conclusion that incremental pricing should not be imposed.

The rules exempting agricultural uses from incremental pricing are being considered in separate dockets.[9] Exempt agricultural use will not be considered in determining the 300 Mcf per day non-boiler use exemption established by this order. Thus if a facility uses an average of 900 Mcf per day in non-boiler applications, with 200 Mcf of this eligible for an agricultural exemption, the facility would pay surcharges on 400 Mcf per day. The exempt 500 Mcf per day would be comprised of the first 300 Mcf per day plus the 200 Mcf per day agricultural exemption.

*C. The Alternative Fuel Price Ceiling*

In the Phase II Notice of Proposed Rulemaking the Commission proposed that the alternative fuel price ceiling to be applied to non-exempt industrial facilities subject to Phase II should be the same three-tier system of price ceilings that was adopted in Phase I of the incremental pricing program. However, as explained below, the Commission has determined that a three-tier alternative fuel price ceiling should not be adopted for Phase II. Instead, the Commission has adopted a single-tier alternative price ceiling based on the price of No. 6 high sulfur fuel oil.

Section 204(e) of the Natural Gas Policy Act requires that for both Phase I and Phase II, the Commission is to establish an alternative fuel price ceiling for incrementally priced industrial facilities. That ceiling is to be the price of No. 2 fuel oil unless the Commission determines that the ceiling price to an amount not lower than the price for No. 6 fuel oil. Generally speaking, the Commission may reduce the alternative fuel price ceiling below the level of the price for No. 2 fuel oil if such action is necessary to prevent industrial load loss that results in rate increases to high-priority customers. The Commission's specific authorization to reduce the alternative fuel price ceiling is set forth in section 204(e)(2):

> (2) REDUCTION OF APPROPRIATE ALTERNATIVE FUEL COST ALLOWED.—The Commission may, by rule or order, reduce the appropriate alternative fuel cost—

[9] See Notice of Proposed Rulemaking, Docket Nos. RM80-28 and RM80-29 (45 FR 15363, March 11, 1980).

(A) for any category of incrementally priced industrial facilities, subject to the rule required under section 201 (including any amendment under section 202 to such rule) located within any region and served by the same interstate pipeline; or

(B) for any specific incrementally priced industrial facility which is subject to such requirements and which is located in any region;

to an amount not lower than the price, per million Btu's, for Number 6 fuel oil determined by the Commission to be paid in such region by industrial users of such fuel, if and to the extent the Commission determines, after an opportunity for written and oral presentation of views, data, and arguments, that such reduction is necessary to prevent increases in the rates and charges to residential, small commercial, and other high-priority users of natural gas which would result from a reallocation of costs caused by the conversion of such industrial facility or facilities from natural gas to other fuels, which conversion is likely to occur if the level of the appropriate fuel cost were not so reduced.

In Phase I of the incremental pricing program, the Commission adopted a three-tier system of price ceilings as a means of balancing the objectives of maximizing the passthrough of "high price" gas costs to boiler fuel users and, on the other hand, preventing load shifting that would increase rates and charges to high-priority users.[10] Under this system, regional prices for No. 2 fuel oil, low-sulfur No. 6 fuel oil, and high-sulfur No. 6 fuel oil are designated as ceilings on the price of gas for industrial boiler fuel users. The ceiling for a particular user is to be equal to the price of the least expensive fuel oil that the customer has the installed capability and legal authority to burn.

At the same time that the Commission adopted the rule for a three-tier system of price ceilings, it also adopted an exemption to that rule. Pursuant to its authority under secion 206(d) of the NGPA, the Commission determined that until November 1, 1980, a single price ceiling set at the high-sulfur No. 6 price level should be used.[11] The Commission reasoned that a delay in implementing the three-tier system was necessary to permit industry an opportunity to adjust to the incremental pricing program. Also, it was determined that the delay would permit the Energy Information Administration, the organization with responsibility for gathering price data and computing price ceilings, to gain experience in meeting the incremental pricing data needs.

As required by section 206(d)(2) the exemptive rule was submitted to Congress for its review and possible one-House disapproval. Neither House disapproved the delay of the three-tier ceiling and the rule became effective December 1, 1979. In an order that is being issued concurrently with this Phase II rule, the Commission is submitting for Congressional review another rule under section 206(d) that would delay implementation of the three-tier ceiling for Phase I for an additional year.

For Phase II the Commission's Notice of Proposed Rulemaking provided that the three-tier ceiling approach adopted in Phase I be applied to an expanded incremental pricing program. In the Notice,

[10] Order No. 50, issued September 28, 1979.
[11] Order No. 51, issued September 28, 1979.

the Commission explained that a three-tier system of price ceilings would maximize the recovery of incremental costs for a non-exempt facility but would also minimize the possibility that a facility will switch to an alternative fuel. In the Notice, the Commission also suggested that a price ceiling identical to that adopted in Phase I would impose the least administrative burden upon incrementally priced facilities.

Written comments and hearing statements submitted in response to the proposal to extend the three-tier system of price ceiligns largely opposed its adoption. These comments argued that if incremental pricing is to be expanded to non-boiler fuel uses the price ceiling for facilities subject to Phase II should be no higher than the price for high-sulfur No. 6 fuel oil.

Two major themes supporting a single-tier No. 6 ceiling have emerged. First, many commenters, including AGA, INGAA, the National Association of Manufacturers and several state utility commissions, argued that a three-tier ceiling would cause economic dislocations among those users subject to a Phase II rule. Assuming the ceiling system were to include prices as high as No. 2 fuel oil as an alternative price ceiling, commenters argued, industrial load loss would occur on interstate systems as a consequence of the relocation of facilities using interstate gas that is subject to incremental pricing to intrastate markets where gas is not subject to incremental pricing. Also, many of those submitting comments, such as Herman Energy Services and Sun Pac Foods, argued that if the incremental pricing program is expanded, a three-tier ceiling will exacerbate the competitive disadvantage of domestic industry relative to foreign industry. Other commenters forecasted that a three-tier system of price ceilings could cause some industrial facilities to burn imported fuel oil. And, finally, those who foresaw unfavorable economic impacts resulting from a three-tier system alleged that industrial facilities that currently lack the capability to burn No. 6 fuel oil will make unproductive investments by installing unneeded No. 6 fuel oil burning equipment solely for the purpose of qualifying for a lower alternative fuel price.

The second major theme argued by those opposed to the adoption of a three-tier ceiling is that such a system will produce inequitable results. Those commenters asserting this view noted that oil prices have increased dramatically since enactment of the NGPA and current prices for No. 6 fuel oil are now at the level that Congress expected for No. 2 fuel oil. Because of these circumstances, the comments argued that at a single-tier No. 6 ceiling, residential and other high-priority gas customers will benefit from price shielding at a level comparable to that envisioned by Congress in 1978. Any additional price shielding resulting from adoption of a three- tier approach will, according to these comments, mask the price of gas to high-priority customers and erode incentives to conserve gas. Moreover, these commenters argued that price shielding of high-priority gas consumers is inequitable to homeowners and others that do not have the capability to burn gas. Commenters advocating this point of view asserted that oil consumers who would otherwise qualify as high-priority users if they had the capability to use gas as their energy source, will be excluded from any price shielding following rapid cost increases. And, it is further a

leged, all consumers will subsidize high-priority gas users because higher prices must be paid for those goods that are manufactured using incrementally priced gas. To temper these adverse consequences, these commenters urged the Commission to adopt a single-tier ceiling.

Not all those submitting comments, however, supported adoption of a single-tier, high-sulfur No. 6 ceiling. The Consumer Energy Council of America, the New York State Consumer Protection Board and other commenters urged the Commission to adopt and implement immediately the three-tier approach set forth in the Notice of Proposed Rulemaking. Others, such as the California and Wisconsin public utility commissions, urged the Commission to phase-in the three-tier approach over time or apply different ceiling prices to different gas users, such as a No. 2 ceiling for customers subject to a firm rate schedule and a No. 6 ceiling for the interruptible customers. Finally, other commenters, such as Mississippi Valley Gas and the North Carolina Utilities Commission, et al., urged the Commission to adopt a fourth tier to recognize that there are gas users that cannot convert to fuel oil but must rely upon propane as an alternative fuel.

1. *Single-Tier High Sulfur No. 6 Fuel Oil Ceiling for Phase II.*— The Commission believes that many of the comments opposing a three-tier ceiling provide compelling reasons for adopting a single-tier high-sulfur No. 6 ceiling. Although the Congress made the fundamental determination that high-priority users should be shielded from the near-term adverse transitional effects of deregulation, it left it to this Commission to determine the level of the price ceiling. The only limitation is that the basis for the alternative fuel ceiling prescribed by the Commission must, pursuant to section 204(e)(2), be the prevention of load loss that will cause higher rates and charges to be levied upon high priority and other exempt users. The potential for this effect, as expressed by many commenters, has contributed to the Commission's choice of an alternative fuel price ceiling.

As indicated, many commenters representing a cross section of industrial gas users have stated that a three-tier ceiling presents the potential for severe industrial load loss. Assuming interstate pipelines were to experience such load loss, increased rates and charges to high-priority gas users could be accelerated as a result of the reallocation of fixed costs. This would not be a result intended by the Congress.

But, at the same time that the Commission acts to minimize industrial load loss, it must also advance another objective inherent in the NGPA. The Commission believes that Title II reflects a Congressional determination that non-exempt industrial users should be charged prices that more closely reflect the commodity value of gas. By charging industrial gas users a price closer to that of fuel oil—the benchmark for determining the commodity value of gas—the incremental pricing program recognizes that Federal natural gas regulatory policies have resulted in underpricing gas in relation to its commodity value. Current policy, as articulated by the NGPA, is designed to increase production and to discourage any excessive use of their premium energy source. The economic efficiency arguments made by industrial commenters who caution against artifically low prices to exempt users would seem to suggest that, at the very least, the price of gas to industrial users themselves be raised to the level contained in this Phase II rule.

While the NGPA compels some increase in industrial gas prices, the Commission's choice of an alternative fuel price ceiling should be based on a balancing of several policy objectives which include price shielding and the need to minimize industrial load loss. The Commission judges that such a balance is best struck with a single-tier high-sulfur No. 6 fuel oil ceiling. In adopting this single-tier ceiling, the Commission notes the many comments emphasizing that the price of No. 2 oil has risen to such levels that, should the price of natural gas be forced to that level, the economic impact on industry would be so severe that in many instances it could not be absorbed and rates would be increased to exempt users. It is noteworthy that these same commenters anticipate the cost of gas could reach price equivalence with No. 2 fuel oil upon deregulation in 1985. It is the premature establishment of such prices by regulation rather than by the marketplace that appears most objectionable to industry.

The Commission also notes the substantial rise in oil prices since the NGPA was passed in 1978 and the particularly large increase in distillate fuel oil prices. Many commenters, including Stauffer Chemical, argued that these price movements will cause the effect of a No. 6 high-sulfur ceiling to be as substantial as the Congress intended when it passed the NGPA.[12]

The adoption of a minimum commodity-value gas price for industry should also minimize, if not eliminate, the type of severe regional or international competitive disruption that was predicted in many industrial comments. For example, there is considerable doubt as to whether incremental pricing even at higher alternative fuel ceilings as were in the Commission's November Phase II proposal would lead to industrial relocation to intrastate markets. Industrial users may well confront higher delivered prices in intrastate markets after deregulation in 1985 because a greater fraction of intrastate gas will be deregulated at that time. So, an industrial user would experience at most a four-year gas cost advantage from such a move. A transitory benefit of this nature would be unlikely to induce significant industrial relocation.

In this order the Commission has determined that the scope of Phase II should be applied broadly to include all industrial gas users except those statutorily exempt. A study undertaken by DOE for purposes of commenting upon this rule suggests that a single-tier ceiling No. 6 fuel oil, applied broadly, will provide residential and commercial gas consumers a high degree of price shielding falling just short of maximum protection in 1984. Accordingly, a reasoned response to

[12] The prices of fuel oil have risen significantly since November 1978, when the NGPA was enacted. The following table summarizes changes that have occurred in delivered industrial prices. Figures are expressed in term of prime per million Btu's:

| | November 1978 | Current [1] |
|---|---|---|
| No. 6 high sulfur | $1.73 | $3.34 |
| No. 6 low sulfur | 2.10 | 3.97 |
| No. 2 | 3.10 | [2] 5.13 |
| Natural gas | 1.75 | 2.60 |

[1] Source: Monthly Energy Review, March 1980.
[2] Wholesale heating oil.

those comments that foresee industrial load loss is to adopt a high-sulfur No. 6 ceiling that can be expected to provide a significant degree of price shielding.

Furthermore, the Commission believes that for Phase II, the No. 6 ceiling is more equitable than a three-tier system of ceiling prices. A No. 6 ceiling responds to those comments that argued that it is inequitable for high-priority gas consumers to enjoy price shielding not available to those who must purchase oil to operate their homes and businesses. For residential and other exempt users of gas, it was the decision of Congress to provide a price shielding mechanism that is not available to those energy consumers that purchase and use oil.

A No. 6 alternative fuel ceiling also responds to the commenters that argued that it is inequitable for the general public to pay for those consumer goods which will allegedly bear higher prices caused when manufacturers pass on their incremental gas costs. The comments of the American Gas Association typified this argument. AGA argued that prices for many consumer goods would be increased by the incremental pricing program and that the effect of such price increases would be an accelerated rate of inflation. In a later section of this order, the Commission has more fully considered this argument and concluded that most, if not all, of the increased inflation foreseen by the AGA will not occur. In contrast to AGA's projections, commenters such as DOE and the Council on Wage and Price Stability suggest that competitive considerations would likely preclude the flow-through of a significant measure of increased gas costs. Also, AGA's analysis is premised on an econometric model that contemplates application of a three-tier ceiling. However, when considered together with the adoption of an exemption from incremental pricing for the first 300 Mcf of gas for all incrementally priced industrial facilities, the Commission's adoption of a single-tier ceiling should negate significant price increases for consumer goods.

The No. 6 ceiling adopted here also resolves two other concerns. Several commenters argued that many industrial facilities cannot use oil as an alternative fuel but must rely instead on propane as the alternative energy source. As indicated in the Notice of Proposed Rulemaking, such facilities would be priced at the level of No. 2 fuel oil, even though the price of propane is often closer to the price of residual fuel oil. By the action taken here, the Commission responds to these comments by adopting a single-tier high-sulfur No. 6 ceiling. Also, a high-sulfur No. 6 ceiling responds to the alleged inequity created as a result of pricing a facility at a No. 2 ceiling unless the facility has the capability to burn No. 6 fuel oil. All facilities subject to a Phase II rule will be priced at a high-sulfur No. 6 ceiling and, consequently, industrial facilities will not be constrained to buy and install equipment with the capacity to burn No. 6 fuel oil.

Finally, in applying the high-sulfur No. 6 ceiling, the Commission has determined that other aspects related to this ceiling approach should correspond to the previous Commission order that adopted a three-tier ceiling in Phase I. Thus, the Commission will request EIA to use the same method for computing the ceiling for Phase II as is used for computing the monthly ceilings for Phase I. Also, the Phase II ceiling will be applied to the 48 contiguous states and 31

metropolitan regions. However, until October 31, 1981, the regions will be limited to the 48 contiguous states.

2. *State Authority to Limit First-Year Impacts.*—The Commission has also determined to provide a mechanism to limit the first-year impacts of the Phase II incremental pricing program. The effect of the Commission's determination could serve to lower the effective alternative fuel price ceiling for some facilities.

Under this mechanism, each state will be given the discretion during the first year of the Phase II incremental pricing program to allocate to other incrementally priced gas users within the state that portion of a non-exempt user's surcharge which exceeds an average of 75 cents per Mcf. In determining whether the surcharge to an industrial user exceeded an average of 75 cents, costs related to gas used for exempt purposes would be included in that determination.

In choosing the 75 cent threshold, the Commission is guided by the likely average cost increases to non-exempt users for the first year and, also, the Commission's judgment about when greater-than-expected incremental cost increases should be ameliorated. The Commission's best estimate is that the average first-year cost increase to Phase II users will average approximately 50 cents per Mcf. However, should oil prices rise significantly faster than anticipated, the first-year cost increases would be greater than expected. If the average cost increases were to increase to 75 cents per Mcf, or 50 percent more than currently anticipated, the Commission believes there would exist a sufficient basis upon which to take mitigating actions.

The mechanism provided here allows a state to assess independently the impact of incremental pricing upon individual industrial users within the state and determine whether a surcharge in excess of 75 cents presents too severe a burden upon that user.

During an informal conference held at the Commission on April 15, 1980, representatives from a number of state regulatory commissions expressed doubt that the authority to limit first-year impacts would be exercised. The representatives cited possible constraints in state laws against such adjustments. They also cited practical and policy considerations which might lead a state commission to decline to make use of any such adjustment authority. Nonetheless, the Commission believes that individual and unforeseeable circumstances may warrant mitigating action and that state commissions are the proper governmental bodies to assess the economic and equity issues involved.

The Commission believes it is desirable to make such authority available for those states which can or wish to make use of such authority. Some states indicated by written comments and oral argument that they may be legally precluded from making such adjustments. Since Congressional review of this rule implies quasi-legislative status, states may have sufficient authority to prevail against a challenge to this mitigating action as violative of state non-discriminatory laws.

*D. Market Ordering*

*1. The threat of price instability upon deregulation*

The ceiling price of new natural gas will be $2.90 per Mcf, or the energy equivalent of $18.00 per barrel of oil, (in constant 1980 dollars) at year-end 1984. One day later, price controls on that gas will cease to apply.

The exact price to which new natural gas will rise upon deregulation will depend upon market factors that cannot be fully anticipated at this time. On balance, the record developed in this proceeding indicates that the wellhead price of deregulated gas purchased by interstate pipelines in 1985 is likely to rise significantly as a result of two influences. One influence is the overall condition of natural gas markets; if demand exceeds supply there will be upward pressure on prices. The other influence of new gas prices will be the continued regulation of "old" natural gas at prices below its commodity value. This gas provides an opportunity for pipelines and distribution companies to "roll-in" or average this low-cost gas with high-cost gas and still have a marketable product. The result could be considerable market instability.

Most comments that addressed the pricing issue predicted that after deregulation the average delivered price of gas will move, over time, toward a price equivalent to the delivered price of fuel oil. If so, the dramatic run up in fuel oil prices that has occurred since the NGPA was enacted in 1978 could cause the wellhead price of new natural gas to jump significantly when deregulated on January 1, 1985. Some observers base their assessment of where the wellhead price of new gas will go in 1985 by assuming that it will simply track the price of "high cost" gas that is already deregulated. Some of this "high cost" gas is being purchased today at prices equal to or greater than the equivalent price of No. 2 distillate oil.

The current delivered price of No. 2 fuel oil is about $32.00 per barrel, or $5.50 per MMBtu. Assuming 2 percent per year real growth in the price of No. 2 fuel oil between now and 1985, the price would be in the $6.00 per MMBtu range. If high cost gas prices remain tied to No. 2 fuel oil prices and set the market price for all deregulated gas, then the price of new natural gas will double upon deregulation. Pipelines may be able to pay prices equivalent to No. 2 oil for deregulated new gas in 1985 and yet maintain overall marketability due to their ability to blend this relatively high priced block of gas with lower priced "old" gas.

Natural gas markets can currently support prices in the $6.00 per MMBtu range for limited amounts of "high cost" deregulated gas, but there is reason to question whether such prices can be maintained over the long run. One strong conclusion emerging from the Commission's work on Phases I and II of incremental pricing is that there is a substantial block of demand in the industrial and electric utility sectors that has dual firing (natural gas and fuel oil) capability. Most industrial and electric utility boiler fuel use, and a considerable portion of industrial process use, will switch from gas to oil if relative prices favor such switching. Twenty to twenty-five percent of interstate demand is encompassed by users with dual firing capability. Most of these users have the current or technical capability to burn residual fuel oil, and would presumably switch away from gas well before delivered gas prices approach equivalence with No. 2 fuel oil prices.

Confronted with the prospect of losing so significant a portion of their market, interstate pipelines will attempt to keep the average delivered cost of gas competitive with residual fuel oil prices. As volumes of old gas decline, and therefore the amount of subsidization of new

gas by old gas diminishes, the wellhead price of deregulated gas will eventually be below the level of equivalent distillate oil prices. If gas supplies are ample and if fuel oil prices remain as depressed as they are at present, it is possible that any "spike" or surge in deregulated wellhead gas prices in excess of long-run equilibrium levels will be both small and short-lived. Currently, industrial delivered gas prices are in the general range of delivered residual oil prices in most regions of the country.

Important gauges of gas market conditions as 1985 approaches are (1) whether the price of deregulated "high cost" gas is falling in relation to delivered fuel oil prices, and (2) whether other categories of gas, particularly new gas, are selling below the applicable maximum lawful ceilings set by Title I. If high cost gas prices remain at or above No. 2 fuel oil price levels in 1984, and if Title I ceiling prices are acting as binding constraints on wellhead prices, then these indicators would suggest that some significant price jump can be expected to occur January 1, 1985.

The pace at which prices might rise in 1985 is also important. The issue turns in large measure on whether producers of gas to be deregulated in 1985 will have contractual authority to immediately collect market prices, or whether instead the pricing terms of contracts covering deregulated gas will hold the price of that gas to some lower level.

In response to questions posed by the Commission on this issue, various interstate pipelines, including the United Gas Pipe Line Company, indicated that all of the contracts now written for gas that will be subject to deregulation in 1985 contain so-called "most favored nation" clauses that are designed to go into effect on January 1, 1985, or whenever gas covered by the contract is deregulated. These clauses permit a producer (seller) to instantaneously adjust the price of its deregulated gas up to the highest prices being received by any producer in the same field or area in which the production subject to the contract is located. Should this type of clause be the rule rather than the exception with respect to gas subject to deregulation, then the upward surge of wellhead prices in 1985 could be very swift.

The Commission was unable to determine with certainty that the use of most favored producer clauses is the sole or predominant practice with respect to gas subject to deregulation. This question was directed to the Interstate Natural Gas Association of America (INGAA), which subsequently asked this question of its member pipelines. However, INGAA was unable to provide a generalized statement on pipeline contracting practices.[13]

### *2. Volumes subject to deregulation in 1985*

The amount of gas that will be subject to deregulation in 1985, and therefore the resulting overall impact of deregulation on delivered gas prices, is uncertain. Some comments, nevertheless, attempted to esti-

[13] I regret that we are not in a position to provide you with sufficient information which would warrant the formulation of a generalized statement as to the contracting practices of the interstate gas transmission industry as a whole with respect to this subject. We did undertake to obtain such information. However, the responses received do not provide a representative base, nor do they contain sufficient content to permit a meaningful comparison. In that regard, we found that certain members were very general in their response, and others declined to respond. (Letter from Lawrence V. Robertson, Jr., Vice President, General Counsel and Secretary of INGAA, to Commissioner George Hall, dated February 8, 1980).

mate the volume of gas subject to deregulation in 1985. The Department of Energy estimated that between 55 and 65 percent of the flowing gas in 1985 will be deregulated. The American Gas Association estimated a somewhat smaller fraction—40 percent of flowing gas in 1985—being subject to deregulation. The Commission believes that these estimates are reasonable and provide a useful range for purposes of examining the effects on consumers of deregulation in 1985.

If 40 percent of the flowing gas stream in 1985 is deregulated and moves up in price by roughly $3.00 from $2.90 per MMBtu to $6.00, then the average price impact on all flowing gas would be approximately $1.20 per Mcf in 1980 dollars. If more than 60 percent of all flowing gas in 1985 is deregulated and moves up by the same $3.00 increment, the average impact on all flowing gas would be closer to $2.00 per Mcf in 1980 dollars. Such changes would represent a 30 percent increase over anticipated residential rates that should be approximately $5.00 per Mcf (constant 1980 dollars) and a 40 percent real increase over industrial rates that will be in the $4.00 per Mcf range at year end 1984.[14]

The Department of Energy expressed strong concern that the impact of a price "spike" at the time of deregulation in 1985 might be even more pronounced on intrastate consumers than upon interstate customers. This larger impact may result because, although gas in the intrastate markets will be regulated at roughly the same level as prices in the interstate market through 1984, the amount of intrastate gas subject to deregulation in 1985 will be far greater. As much as 85 to 90 percent of all flowing gas in the intrastate market may be deregulated under the terms of Title I in 1985. The impact of deregulation on average delivered prices of natural gas in the intrastate market could therefore amount to $2.50 or more per Mcf.

The DOE comment, in noting the larger economic impact of the price "spike" upon intrastate pipelines and their consumers, went on to explain that intrastate pipelines will be placed at a competitive disadvantage vis-a-vis interstate pipelines with respect to bidding for supplies of deregulated gas. The competitive disadvantage to intrastate bidders arises from their smaller endowment of lower-priced gas subject to continuing regulation. The larger endowment of lower priced gas enjoyed by interstate pipelines will permit them to more heavily subsidize purchases of new gas out of their old gas "discounts".

Whether there will be a price spike upon deregulation, and whether the spike will have a significant impact on the distribution of gas between the inter- and intrastate markets will depend to a considerable degree on whether demand and supply for natural gas are in balance in 1985. If demand for natural gas considerably exceeds supply, there is a greater incentive for interstate pipelines to bid the price of deregulated gas to levels above long run market clearing levels. The ability of interstate pipelines to bid higher than long run marginal prices for deregulated gas and yet maintain overall marketability of the gas stream by averaging its cost could result in higher prices being bid by interstate pipelines than intrastate consumers would be willing or

[14] Based on 1984 retail estimates contained in comments submitted by DOE (Table III-3).

able to pay. Should deregulated prices rise in the short run above intrastate market clearing levels, there is the potential for sudden redistribution of gas supplies between inter- and intrastate markets upon deregulation in 1985.

The Commission made a substantial attempt to assess the outlook for natural gas supply and demand in 1985 as a part of its deliberations in this proceeding. On the basis of comments received, the Commission must first emphasize the extreme uncertainty inherent in this inquiry. Natural gas markets have changed dramatically in recent years, and may well experience further change. Nonetheless, the body of comments suggests that the potential for market imbalance in 1985 is very real. Numerous gas supply experts pointed out that the current rate of natural gas production significantly exceeds current rates of reserve additions. Studies submitted for the record in this proceeding, including those by Edward Erickson and James T. Jensen, point to declining availability of conventional gas supplies over the mid- and long-term. The concensus appears to be that conventional lower 48 production may decline from a 1978 level of 19 Tcf to 16–17 Tcf in 1985, and will continue to decline to 12–14 Tcf in 1990.

A decline in production is forecast despite the current and likely continuing upsurge in drilling activity in the United States. According to Erickson's analysis, the rate of drilling activity will have to increase by 15 percent per year in each year between now and 1985 to sustain current production rates of natural gas. The Commission observers that there were record levels of drilling and gas well completions this past year in response to the incentive prices for natural gas allowed under the NGPA. Approximately 12 percent more rotary rigs were active in 1979 than in 1978. A sustained 15 percent per year increase through 1985 may be achievable, but not without a production commitment of unprecedented magnitude and duration.

Further, the scheduled decontrol of crude oil by year-end 1981 has created a roughly $5.00 to $6.00 per MMBtu incentive for new crude oil exploration and production. The wellhead natural gas price schedules under the NGPA provide incentives roughly half of that level. The Commission therefore perceives a potential producer bias toward crude oil and away from natural gas during the next few years despite the positive incentives created by the Natural Gas Policy Act. These factors may make it increasingly difficult to maintain natural gas production levels over the next four to five years.

While the record in this proceeding suggests a decline in natural gas production over the next decade, the comments of many end users, as well as by the American Gas Association, whose members include a number of distribution companies, reflect a growing demand for natural gas. According to the American Gas Association, the "economic demand" for natural gas in 1985 will be 26 Tcf. Current consumption is about 19 Tcf. In light of the current and expected price differential between natural gas and oil products, demand for natural gas may well be increasing.

In summary, most commenters appear to be in agreement that natural gas markets may experience a substantial and potentially abrupt increase in delivered natural gas prices in 1985. The ability of our economic and political systems to withstand a sudden energy

price "shock" of the dimension that might occur in 1985 will no doubt be a subject of further debate. James T. Jensen, in his comments, expressed the view that the transition is inevitable and that policies such as incremental pricing which are designed to moderate transitional difficulties may create more problems than they cure. The Commission views this as an issue that, in the instant proceeding, must be resolved by the Congress. But the record does tend to underscore and support the concern that the Congress had in 1978 over the possibility of a disorderly transition to deregulation in 1985.

*3. The Inability of Title II to Achieve Market Ordering*

Despite the need to achieve an orderly transition from regulated to deregulated gas markets, the incremental pricing program as specified by Title II of the NGPA does not appear to generate the type of demand restraint that Congress sought. This conclusion stems from two sets of considerations. The first set derives from the institutions and structure of the natural gas industry. The second set of considerations stems primarily from limitations within the statute itself.

a. *Institutional Considerations.*—With respect to institutional factors limiting the ability of incremental pricing to restrain pipeline bidding for deregulated gas, the Commission accepts the view expressed in many comments stating that industrial end users who have little or no capability to switch to alternative fuels (*e.g.*, most feedstock and many process users) are in a relatively weak position to affect the prices that pipelines will pay for natural gas. Only by reducing substantially their takes, through curtailment of operations or plant closings, can they hope to have any significant influence on pipeline bidding operations. Some conservation may be achievable by users without fuel switching capability, but the record before the Commission suggests that the results of such conservation efforts are likely to be too gradual, indirect, and difficult to measure for these effects to have significant short term influence on pipeline gas purchasing decisions. In short, incremental pricing is designed to exploit the demand responsiveness of price-sensitive marginal industrial consumers of natural gas. Where an industrial customer does not have alternative fuel capability, his short-term price responsiveness will be inadequate to produce significant demand restraint.

A majority of comments filed in this proceeding suggest that many process uses of natural gas proposed to be made subject to the scope of the Phase II rule are not capable of using alternative fuels in the short run. The Commission is uncertain as to what portion of the volumes of use subject to the Phase II amendment do in fact have a present or near term capability to use an alternative fuel. The Commission believes that many process users of natural gas currently without alternative fuel capability will add such capability, particularly in the form of electricity, if such natural gas uses are made subject to incremental pricing. For example, comments by the Process Gas Consumers indicate that many natural gas process applications can and will be economically converted to electricity when the delivered cost of gas is more than one third the delivered cost of electricity, because end use efficiencies are greater in electric applications and the continued availability of electricity is more assured. As stated however, the ex-

tent of present or projected alternative fuel capability for uses within the scope of the Phase II amendment is not discernible at this time.

A second institutional consideration perceived as limiting the ability of incremental pricing to accomplish pipeline bidding restraint lies in the attitudes of pipelines toward their customer markets. Several comments explained that pipelines take a relatively long term outlook when it comes to supply acquisition decisions. Pipelines are seldom deterred from acquiring high priced sources solely on the threat that such gas prices might presently make the gas unmarketable to industrial customers on a stand alone basis. Pipelines perceive that declining old gas volumes compel acquisition of additional supplies in order to maintain service to high priority markets and are unwilling to view the short-run threat of unmarketability to the most price sensitive customer as a deterrent to that acquisition. Stated alternatively, pipelines view industrial customers as marginal customers in the short run but view residential and high priority customers, whose demand for gas is far less price sensitive, as the marginal customers over the long run. It is unclear whether end use pricing policy that targets price increases onto the shortrun marginal customer can be expected to significantly affect pipeline purchasing practices that are dominated by long run supply maintenance considerations.

Still another institutional consideration reflected in the Commission's record in this proceeding is that many industrial users find it hard to believe that they can have any significant influence on the gas purchasing decisions of their interstate pipeline supplier. Many industrial users told the Commission they never talk directly to their interstate pipeline supplier. Instead, they direct any gas supply or price problems to their local distribution company supplier. These commenters do not expect to communicate directly with their interstate pipeline even in the face of rising prices upon deregulation. The comments of interstate pipelines, however, lead the Commission to believe that interstate pipelines are much more sensitive to and concerned about the status of their industrial customers, even industrial customers served indirectly through local distribution company suppliers, than is commonly recognized by the industrial customer.

A final institutional consideration raised in the comments received that may limit the ability of incremental pricing to achieve its market ordering objective is the role of the states in the overall program. As noted previously, a majority of states have raised the rates charged by local distribution companies to industrial customers up to or above the Federally determined alternative fuel price ceiling. This action is taken in order to capture the maximum price shielding benefit for high-priority customers within each state. However, a side effect of state level incremental pricing is that industrial users may perceive the state, rather than the interstate pipeline purchaser, as the cause (and cure) of high delivered gas prices. In effect, state level incremental pricing may remove any perceived reason for industrial customers to appeal to their pipeline to keep the price of gas within reasonable limits. Instead, industrial users may incorrectly perceive that their efforts would be more usefully directed at state ratemaking policy.

b. *Statutory Considerations.*—Even if the first set of considerations relating to the possible institutional limitations on the efficacy of Phase II can be overcome, there is a second set of considerations that leads the Commission to question the ability of Title II to achieve its market ordering purposes. These considerations stem from limitations and inconsistencies in the structure of Title II itself. It appears that Congress intended that the threat of industrial load loss create an incentive on pipelines to moderate their purchased gas costs. This threat is present, however, only if incremental pricing can take the delivered price of industrial gas sufficiently near or even above the price of fuel oil to induce fuel switching. But Title II and its legislative history also evidence a Congressional intent that incremental pricing not be responsible for any significant amount of industrial load loss.

Specifically, section 204 of the NGPA instructs that each user's incremental pricing surcharge is to be calculated in such a way as to bring each user's delivered natural gas price up to, but no higher than, the alternative fuel ceiling as determined by the Commission. Hence if the Commission sets an intentionally low price in order to avoid unintended fuel switching, the industrial user is also effectively held below its true alternative fuel cost.

Because the alternative fuel ceilings in section 204 operate as ceilings rather than floors on the price of delivered industrial natural gas, industrial users who reach their ceilings become indifferent to subsequent increases in wellhead prices of gas because the full increase is borne by exempt rather than incrementally priced users. By making the marginal industrial customer indifferent to further increases in the price of deregulated gas, the net consequence of the price ceilings imposed by the incremental pricing program in Title II may be to increase the likelihood of a price spike and disorderly natural gas markets after deregulation rather than facilitate an orderly transition. Pipelines would be left to make their bidding decisions solely on the basis of the ability of less-price sensitive high priority customers to bear the higher costs of deregulated gas.

Whether the foregoing "cap problem" imposed by Title II will cause deregulated markets to be more unstable than without incremental pricing depends primarily upon when industrial customers subject to incremental pricing reach their alternative fuel ceilings and whether the catch up stage [15] has been completed by 1985.

During the catch up period, as industrial user MSAC's are declining to zero, increases in the average wellhead price of gas are borne totally by exempt users. When the catch up period is over, incrementally priced user surcharges vanish and the system reverts to rolled-in pricing. This means that if the system has completed the catch up period before 1985, then industrial users will not be actively capped by their alternative fuel ceilings and will therefore bear at least the rolled-in portion of deregulated gas prices.

Only during the catch up stage can the alternative Title II fuel price ceiling mechanism actually exacerbate market instability by temporarily insulating industrial users from wellhead prices. Rising wellhead prices during the catch up period are spilled over, and have the effect of raising base rates to incrementally priced users. But under

[15] See discussion of the three stages of incremental pricing in section III-B of this Order.

section 204, these higher base rates are merely offset by reduced surcharges, so that the delivered price, inclusive of surcharge, is unaffected by changes in pipeline gas costs until the catch up period has been completed. Once the catch up stage is over, industrial rates are no longer held at the alternative fuel price ceiling.

The problem associated with the ceiling price aspects of the incremental pricing provisions of Title II appears to be particularly serious under state level incremental pricing. States may set their rates to incrementally priced industrial users at the Federally prescribed alternative fuel price ceiling. The problem that arises is that states will not have sufficient information to know when the "catch up" stage is over and rolled in pricing should be resumed. The net consequence is that states may keep industrial rates below the level that would prevail under rolled-in pricing.

Under incremental pricing administered at the interstate pipeline level, distributors will know when the catch-up period has ended and will know when they or their state regulatory agency should begin to set the price of gas to incrementally priced users at levels higher than the Federally determined alternative fuel price. But when states supersede the interstate pipeline incremental pricing program, they eliminate the process of displacing surcharges through increased base rates, so that the "signal" to revert to rolled-in pricing becomes garbled. It should be clear, therefore, that the cap, when imposed by state level incremental pricing, may constrain industrial prices to an even greater degree than under the Federal incremental pricing system or under rolled-in pricing. This protracted cap on industrial rates could have the effect of exacerbating the volatility of pipeline bids for deregulated gas while also magnifying the potentially disruptive impact of deregulation upon exempt users.

On the other hand, states may be able to reduce or eliminate the seriousness of the cap problem in Title II if they set the price of gas to industrial users at higher than Federally prescribed alternative fuel ceiling levels. Section 205 of the Act prevents states from setting industrial rates lower than the alternative fuel price ceiling but reserves the right of states to impose higher rates to incrementally priced users.

Another possible approach that the states may adopt in an effort to impose market discipline and stability during deregulation would be to deny local distribution companies full pass through of any natural gas costs that the state determines to be a consequence of interstate pipeline purchases at excessively high prices. During its hearings on the Phase II incremental pricing rules, the Commission was told that states in most instances have the legal authority to deny full pass through by their jurisdictional distribution companies of gas acquisition costs considered to be excessively high. It is far from clear, however, that the states would exercise such authority in even the most extreme circumstances following decontrol in 1985. The Commission further points out that it is in no way able, nor does it seek the authority, to compel states to take such action in 1985.

The Title II alternative fuel ceiling on incremental pricing surcharges is determined by the price of alternative fuel oil. The concern with market disorder, however, is directed to the possibility that the price of deregulated natural gas at the wellhead might rise to a level

higher than oil-equivalent prices. By placing a ceiling on incremental pricing surcharges such that the industrial incrementally priced user's price cannot go above its alternative fuel oil price, the statute effectively deflects any excessively high portion of deregulated wellhead prices away from incrementally priced industrial users and onto exempt higher priority users. The motivation for this limitation is apparently the Congressional desire to avoid industrial load loss. The consequence, however, appears to conflict directly with the objective of demand restraint and market ordering insofar as incrementally priced users are shielded from the very disorder they are supposed to help cure.

Some form of end-use pricing system based not on oil prices but based instead on measures indigenous to the natural gas system would seem preferable to the oil-based ceiling in order to achieve the Congressional market ordering objective that, in part, led to enactment of Title II. At present, the Commission does not believe that its discretion to set appropriate alternative fuel ceiling prices is a sufficiently broad grant of authority to permit incrementally priced user surcharges to be based upon the performance of the gas market rather than upon prices of alternative fuel oil. The Commission will, however, continue to explore this question as well as the related question of whether other discretionary aspects of Title II can be interpreted in a manner that would support achievement of Congress' market ordering objectives.

*4. Further Study and Recommendation To The Congress*

The Commission believes that the appropriate course of action at this time, considering the uncertainty that exists as to the appropriate amount of market ordering that will need to be brought to bear in 1985, is to commit to further study of future market conditions. The Commission acknowledges and accepts the view of those who argue that incremental pricing is a complex program. The Commission in its efforts to bring order to a deregulated natural gas market might well produce greater disorder through improperly designed incremental pricing regulations. Even if the Commission were directed by the Congress to exercise broader discretion in its administration of Title II, it does not appear feasible or advisable to attempt to craft a program in 1980 that tries to produce optimal performance in 1985. For these reasons the Commission will continue to examine anticipated 1985 market conditions, and by year end 1983 will deliver to the Congress a report that delineates the overall condition of the gas market and any recommended administrative measures then perceived to be available to the Commission that could be directed toward achieving the appropriate amount of market ordering.

One such measure already under Commission consideration is a proposal to link incremental pricing alternative fuel price ceilings with industrial user curtailment priority. Under this approach each user, rather than this Commission, would determine its own alternative fuel price ceiling. To avoid what would otherwise be a strong incentive of a facility to understate its alternative fuel ceiling and thereby minimize or even avoid its incremental pricing surcharge, the approach would tie the industrial user's curtailment priority to its self-selected alternative fuel pricing ceiling. Simply stated, those users who nominate higher alternative fuel price ceilings would enjoy higher curtailment priority. The Commission has been interested in this concept and last

summer issued a Notice of Inquiry and held an informal conference to receive comments. The Commission's continued strong interest in the approach stems from a desire to substitute market forces for regulatory programs governing both curtailment policy and incremental pricing administration that are considerable administrative complexity and burden.

In addition to exploring administrative options that might help to cure the cap problem perceived to exist under Title II, the Commission will in its 1983 review also make appropriate legislation recommendations to the Congress to assure that the incremental pricing program does not conflict with its Congressionally stated purpose of easing the transition of natural gas markets deregulation in 1985 and thereafter.

One specific area of inquiry relevant to Congress's market ordering goals arises from Section 306 of the Public Utility Regulatory Policies Act of 1978 (PURPA), which calls for a study of gas utility rate design proposals. The study is being conducted by the Department of Energy in consultation with this Commission. The Commission largely on the basis of its work on the incremental pricing program, has come to believe that appropriate wholesale and end use rate design concepts could serve as instruments in preparing natural gas markets for deregulation. However, the Commission also notes, on the basis of the many years in which public attention has been actively directed to electric rate design initiatives, as well as the inherent complexity of gas-rate design, that there is relatively little prospect of a major change in gas retail rate policy and procedures before 1985. Nonetheless, gas retail rate design is the proper focus of increasing public scrutiny.

Traditionally, the fundamental issue in natural gas rate design has involved allocation of pipeline fixed costs to each of the various customer classes being served. This set of issues was the appropriate focus of inquiry during an era in which transportation and distribution costs amounted to 75 percent or more of the delivered price of gas, and the expansion of an efficient natural gas delivery system was of greatest priority. But in recent years the commodity (purchased gas) component of gas rates has risen to the point where it represents more than half the delivered cost of gas.[16] In the future, the commodity component is expected to dominate delivered costs to an even greater extent.

The gas rate design study conducted as directed by PURPA as well as follow-on studies will, it is hoped, lead to substantial examination of the role that gas rate design can play in encouraging stable, orderly and efficient natural gas markets.

*E. Residential and Other High Priority Price Shielding*

The second principal objective intended by the Congress to be achieved through incremental pricing is the partial shielding of residential and other high priority users from the increasing wellhead prices for natural gas allowed by Title I of the NGPA.

Incremental pricing will achieve a measure of price shielding of exempt users by channelling a portion of increased wellhead gas prices

[16] In 1960 the average wellhead price of gas was 14 cents per Mcf, while the average delivered price to end users was 60 cents. At year-end 1979, the figures were $1.35 per Mcf at the wellhead versus $2.52 per Mcf delivered.

to industrial (non-exempt) users of natural gas. To the extent that incrementally priced users absorb higher gas prices, the amount of total costs remaining to be recovered from exempt users will be reduced. Thus, the costs of gas to residential and other exempt gas users will be somewhat lower than if no incremental pricing program were in effect.

As noted previously, the Commission believes that the objective of price shielding can be best advanced by a Phase II rule covering as broad a class of non-exempt users as possible. The Commission also believes, however, that the measure and speed by which price shielding occurs must be tempered by economic and equity considerations. Specifically, the alternative fuel price ceiling should not be set so high as to drive industrial users off of natural gas, thereby creating disarray in both the natural gas market and the economy as a whole. To do so would be inimical to the price shielding objective, because large losses of industrial load would reduce the total amount of incremental gas acquisition costs absorbed by the class of incrementally priced users.

In summary, the Commission concludes that a Phase II rule of broad scope, combined with a moderate alternative fuel price ceiling, is the central feature of a realistic Phase II rule capable of achieving the type of price shielding anticipated by the Congress. According to the Commission's projections in the following section addressing economic impacts, the Phase II rule proposed here is structured with the objective of avoiding economic disruption in the industrial sector and loss of large volumes of non-exempt uses, while benefiting exempt users approximately $.14 per Mcf. This potential benefit translates for the average household using natural gas for heating and cooking purposes to about $18 per year.

The Commission perceives this measure of potential savings to exempt users as the present optimum level of price shielding under an administratively workable and economically reasonable Phase II rule, balancing the need to provide some increase in incremental cost absorption by non-boiler fuel industrial users and the need to avoid industrial disruption.

The Commission would submit that this single tier Phase II rule will provide much price shielding as the Congress originally expected to achieve by Title II because prices of petroleum products have increased dramatically since the NGPA was enacted. The price of No. 6 residual oil at year-end 1980 is likely to be higher than the price of distillate oil in 1978. Because the amount of price shielding is a direct function of the alternative fuel price, whatever benefits accrue to high priority customers from the Commission's decision to use the single No. 6 fuel oil tier from Phase II should be comparable in magnitude to what the Congress had in mind when the NGPA was passed in 1978. The Commission is mindful that the Congress, by means of the statutory review it provided for itself, reserved for Congressional judgment the decision as to whether this amount of price shielding warrants implementation of an expanded incremental pricing program.

In concluding that a Phase II expansion of the incremental pricing program can advance the price shielding objective, the Commission is

cognizant of and has studied carefully the substantial body of comments filed in this proceeding that argued against the achievability of this objective. The most frequently raised objection to the Commission's attempting to implement the Congressional directive to provide enhanced price shielding is the argument that a Phase II rule would ultimately harm exempt users rather than help them. These comments contended that a Phase II rule, especially a broad rule, will actually increase the price of gas to exempt users. It was argued that the Phase II rule will result in sufficient load loss among non-exempt users such that a far greater share of fixed transmission and distribution costs will have to be borne by exempt users. These increased costs would include expenses for additional peak shaving and storage facilities that would be necessary if a supplier's interruptible industrial loads were lost. Higher delivered gas prices would also result from increased costs of financing due to service instability confronting pipelines and distributors.

The Columbia Gas Distribution Company, Natural Gas Pipeline Company of America and the AGA, among others, making comments embodying this theme asserted that any load loss is incompatible with the Commission's mandate under Title II of the NGPA.

The Commission does not accept the view that any load loss would be incompatible with either the letter or the intent of Title II. Under section 204(e), the Commission is granted the authority, but is not required, to lower the alternative fuel price ceiling below the price of No. 2 fuel oil. The first important point, therefore, is that Congress recognized that too high an alternative fuel price ceiling could have an adverse impact on exempt customers, which led it to provide a mechanism allowing the Commission to reduce the ceiling price. But the Congress clearly did not compel the Commission to reduce alternative fuel price ceiling levels in every instance in order to avoid adverse impacts on high priority users.

The Commission seeks to exercise its discretion to set the alternative fuel price ceiling low enough to avoid increased rates to residential, small commercial and other high priority users. But this does not, in the Commission's view, mean that there must be absolutely no industrial load loss. In fact, some degree of load loss may be consistent with the objective of maximizing incremental pricing benefits to high priority users. As the Department of Energy explained in its comments, the Commission's approach to determining an appropriate alternative fuel price ceiling should weigh the amount of absorption capability (MSAC's) of remaining non-exempt users against the reduction in fixed charge recovery from users who switch from gas to alternative fuel. Only if the Commission sets an alternative fuel price ceiling so high that the loss in fixed charge recovery exceeds total remaining MSAC's would high priority customers be disadvantaged by incremental pricing.

Furthermore, as discussed more fully in the previous section dealing with market ordering, the Commission believes that the Congress must have intended at least some load loss to result from Title II. Absent a real threat of industrial load loss attributable to incremental pricing, the program cannot be expected to motivate pipelines to restrain their wellhead bidding decisions. Given the program's

market ordering purpose, some industrial load loss would be compatible with Title II if the resulting reduction in deregulated gas acquisition costs more than offsets the increased allocation of fixed costs to high priority customers. Such a result would occur if the reduction in industrial demand for gas so reduces bidding pressures on deregulated gas that the average unit cost of gas (at the wellhead) decreases by more than the amount by which the average unit cost of transmission and distribution is increased. In short, the logic of Title II is that some load loss could, and under appropriate circumstances would, actually benefit high-priority customers. Therefore, the argument that the Commission must assure against any load loss is not persuasive.

Even if some load loss is permissible under incremental pricing, Phase II, if adopted, should not cause any significant load loss because the alternative fuel price ceiling will be set at the No. 6 high sulphur oil price level. The comment of E. I. DuPont de Nemours & Company (DuPont) also pointed out that any increase in the price of gas to exempt users could conceivably occur as a result of industrial load loss would be modest.

Another major theme expressed by TRW, Incorporated, the Proctor and Gamble Company and many other industrial users commenting in this proceeding is that incremental pricing will result in "artificially" low delivered gas prices to residential and other exempt users, thereby eroding their incentive to conserve. These commenters argued that distorting energy price signals cannot be justified, and that no Phase II expansion should be put into effect because it would only magnify those distortions. Industrial users such as the Republic Steel Corporation considered this result particularly unfair, because they contended that they have already achieved greater conservation than residential or other high priority users. If the remaining conservation potential is greater among these latter users, then industrial users believed that the nation's energy goals would be ill served by shielding them from the true cost of the energy. Further, DuPont expressed the fear that without more conservation among exempt users, high priority demand will increase to the extent of bringing earlier curtailment of low priority users.

The Commission accepts the need to provide proper price signals to gas users. However, the Commission notes that as long as gas prices are cost-based and reflect average ("rolled-in") historical costs of old contracts with low prices, the prices yielded by such a regulatory practice will not reflect the commodity value of the gas and, therefore the price signals will not reflect the "true" value of the gas to society. More particularly, the Congress has explicitly made the fundamental social policy decision to redesign the system by which gas costs, in the past, have been allocated among user classes. The Commission regards the explicit reallocation system embodied in Title II as reflecting a Congressional determination going in the other direction—that rolled-in pricing produces unacceptable price shielding of industrial customers.

Furthermore, the Commission believes that the amount of price shielding afforded to high priority users by this Phase II rule will not be of such a magnitude as to mislead them into thinking that their

natural gas costs will not rise significantly and steadily over the coming years. Even if the disputable claim that industrial users have less remaining conservation potential than high priority users is correct, the Commission does not accept the argument that price distortions of the magnitude associated with adoption of this Phase II rule would create any significant disincentive to overall conservation of natural gas.

It is also significant that even though Phase II will raise industrial gas prices and reduce the amount of increases borne by residential and high-priority users, the delivered price of gas to incrementally priced users is projected to remain *less than* the price to residential customers in every state.

The average delivered cost of gas to residential customers served by interstate pipelines is approximately $3.70 per MMBtu. The average industrial rate (exclusive of any incremental pricing surcharge) is about $2.65 per MMBtu. Based on current high sulfur No. 6 oil prices, incremental pricing surcharges are about 25 cents, so the average cost of gas to incrementally priced users is $2.90 per MMBtu. The cost of gas to Phase II users will, therefore, be below the price to residential users. Arguments that incremental pricing in general Phase II in particular will dramatically distort price signals to various customer classes might be valid if No. 2 fuel oil had been used as an alternative fuel ceiling. But in light of the Commission's decision to use a single tier high sulfur No. 6 fuel oil ceiling, these arguments take on diminished significance.

The Commission also calls attention to several comments that correctly characterized incremental pricing under Title II as a purely transitional device. The program initially "loads" gas costs onto industrial users and thereby "shields" other users. But the loading stops when industrial users reach their alternative fuel price ceilings. Subsequent increases in gas costs "spill over" onto high priority and exempt users until they eventually catch up to the price path they would have been in without incremental pricing. While the Commission believes that the amount of price distortion arising from Phase II is not sufficient to conflict with national conservation goals, it also attaches additional significance to the fact that any such distortion will be only temporary. It is interesting to note that while some commenters argued that incremental pricing will cause such dramatic distortions in the energy marketplace that it should not be expanded, other commenters argued that the program is so transitory that its administrative burden is unwarranted.

The Commission concludes that at least on the basis of current conditions, there is no basis for a judgment that Title II in general or Phase II in particular will so seriously distort natural gas price signals as to frustrate progress toward more efficient nationwide use of energy resources. The fact that some, but not all, consumers may be paying prices for gas that reflect its true commodity cost, and thereby receive the proper signals, is at least an improvement over the present situation even if it does not go as far as might be required to effect an overall pricing strategy to promote conservation.

A great many comments called attention to potential inequities seen as resulting from successful price shielding of high priority gas users.

These comments suggested that the ultimate cost of subsidizing exempt gas users will be borne by non-gas homeowners who instead use more expensive fuel oil, electricity, propane, or other sources. The Process Gas Consumers argued, for example, that "incremental pricing affords these latter homeowners no subsidy on their energy bills; yet, incremental gas pricing will force them to pay higher prices for virtually all consumer goods in order to widen the gap between their own energy bills and those of gas consuming residences."

The Mobay Chemical Corporation suggested that it is inequitable to exempt high priority users who have significant potential to conserve and not exempt some industrial users (e.g., feedstock gas users) who, by definition, have no capacity to conserve. It troubled the Petrochemical Energy Group and the Goodyear Tire and Rubber Company, among others, for some high priority industrial uses (e.g., feedstock and other non-boiler uses) to subsidize certain low priority exempt uses (e.g., cogeneration facilities and electric generation).

Title II will, by design, produce results that are more favorable to some classes of users. But the Congress apparently weighed these inequities against the advantages of an incentive wellhead pricing system in Title I of the NGPA, and, on balance, concluded that one was necessary to accommodate the other. It thus falls upon the Commission to exercise appropriately its discretion in crafting a Phase II program that will advance the objectives of the NGPA while avoiding unacceptable and non-mandated inequities arising from the program.

The Commission believes that it has properly responded to the equity concerns raised in comments. The choice of a single No. 6 fuel oil tier rather than the originally proposed three-tier alternative fuel price ceiling system and the first 300 Mcf per day exemption of Phase II uses will greatly reduce the amount of income redistribution resulting from Phase II. Phases I and II together are expected to reallocate no more than about $1.3 billion per year between non-exempt and exempt users.

Comments by the American Gas Association and Process Gas Consumers asserting that Phase II will induce significant economic disruption and increased overall inflation are premised on dollar flows at least six or seven times greater than will result from the Commission's single tier approach. As noted in the following section on the economic effects of Phase II, the President's Council on Wage and Price Stability is persuaded that even the Commission's original Phase II proposal "is unlikely to increase inflation significantly."

The Commission's decision to adopt both the single tier approach and an exemption for the first 300 Mcf per day of Phase II uses stem from recognized need to mitigate any economic or equity disruptions that might have resulted from the Phase II rule as originally proposed.

One specific inequity, identified by Goodyear and others, is that under a three tier system, Phase II users without No. 6 fuel oil capability would pay gas prices equivalent to No. 2 distillate oil prices. Because of the large difference between the prices of No. 2 and No. 6 fuel oil, high priority industrial users without No. 6 capability would contribute far more to the price shielding of exempt users than would lower priority boiler and other industrial users who in general have, or

can relatively easily install, No. 6 capability. In short, a disproportionate share of the subsidy to exempt high priority users would be coming from high priority industrial users if Phase II were to use the three-tier ceiling price system originally proposed. This inequitable result will now be avoided because the Commission will set the alternative fuel price ceiling applicable to Phase II users at the lowest of the three tiers applicable to Phase I uses.

The Commission believes that the Phase II system contained in this rule for submission to Congress, represents the best balancing of the price shielding objective and the need to avoid disruptive and inequitable impacts which ultimately would work against the best interests of the high priority consumers whom Title II was intended to serve. However, as pointed out in several comments, incremental pricing under Title II is a "blunt instrument" for achieving the socio-economic goals Congress sought to accomplish via price shielding.

Title II provides some price sheltering to all exempt users, regardless of their economic need for this or any other type of subsidy. Phases I and II combined will cause about 25 percent of interstate gas to be incrementally priced. Fully 75 percent of all interstate consumption will share the benefits of surcharges paid by industrial users. Thus, a $.60 per MMBtu surcharge paid by incrementally priced users translates into only a $.20 per MMBtu benefit to exempt users. More significant relief to those unable to pay rising gas costs would be better achieved through other mechanisms such as a targeted incremental pricing program or direct energy cost assistance. However, such mechanisms are beyond the scope of Title II, and therefore not a proper subject of this Commission's actions. The Commission nonetheless notes these views and calls them to the attention of the Congress.

### V. ECONOMIC EFFECTS OF PHASE II

Of major concern to the Commission and a majority of commenters is the need for the Phase II rule to be crafted in a manner that avoids imposing excessive economic stress on individual firms or on the overall economy. The Commission believes that the Phase II rule described herein is adequately responsive to those concerns.

The following discussion assesses the direct cost impact of the Phase II rule on those industries that are significant users of natural gas subject to the rule. Using state-by-state industrial gas consumption profiles, the potential impact on each State is also evaluated. Following the section on direct cost impacts is a discussion of the macroeconomic impacts of the Phase II rule.

#### *A. Direct Cost Impact*

Many commenters stated that the proposed three-tier program would result in extremely large increases in energy costs. Industrial users without alternative fuel capability predicted that their gas prices would increase on the order of 200 to 300 percent. The impact of such a price increase was depicted as severe. Many firms affected by Phase II compete with other firms not subject to incremental pricing—either intrastate gas users or foreign companies. Faced with such competition, a company would be constrained in the passthrough of increased costs to the consumer. Unable to fully recover increased

costs, industries would be forced to absorb the costs through reduced profits. A number of commenters stated that plant shutdowns might result from the proposed three-tier incremental pricing program.

In the final Phase II rule, the Commission has adopted two major changes from its proposed Phase II rule that will significantly mitigate any economic damage arising from the program.

The first change is the decision to use a single tier alternative fuel ceiling approach. With the originally proposed No. 2 fuel oil ceiling price, non-exempt gas users would be faced with surcharges of as much as $3.00 per MMBtu. The Commission's decision to apply a single ceiling price based upon high sulfur No. 6 oil will lead to a much lower average surcharge. At present, depressed market conditions for residual oil imply little or no surcharge. Residual oil prices are below average industrial gas rates in some regions, and are only about 25 cents above gas rates in most localities. Residual oil prices are not expected to remain depressed indefinitely, however. Towards the end of 1980, residual oil prices are expected to recover to a level of about $0.60 per MMBtu above the average industrial gas rate. So the Commission's single tier decision has cut the surcharge impacts on many Phase II users by a factor of five.

Furthermore, due to the second major change adopted by the Commission, this much lower surcharge of 60 cents will be paid only on volumes purchased in excess of 300 Mcf per day. This approach to the small use exemption will give every facility an exemption for a fraction of its total gas use, which will effectively lower the average price increase to Phase II users. The analysis contained in Appendix B estimates the effect of this exemption. The results of that analysis suggest that while the impact of the small use exemption on any particular non-exempt user will depend on the user's size, an aggregate of about 20 percent of the gas that would otherwise be subject to surcharge will be exempted by the small use exemption approach taken by the Commission. As a rule of thumb, an average user's first-year surcharge will be reduced from 60 cents to slightly less than 50 cents per Mcf. The effects of the agricultural use exemption are also addressed in Appendix B.

When all the various categories of manufacturing are summed, the total estimated interstate gas subject to incremental pricing under Phase II is as follows:

| *SIC and industry* | | *Nonexempt gas, Millions cubic feet* |
|---|---|---|
| 28 | Chemicals | 118,817,803 |
| 29 | Petroleum | 155,511,318 |
| 32 | Stone, clay and glass | 250,966,173 |
| 33 | Primary metals | 314,283,660 |
| 22 | Textiles | 13,050,650 |
| 26 | Pulp and paper | 2,221,332 |
| -- | Other manufacturing | 308,314,412 |
| | Total | 1,163,165,348 |

Assuming that all gas subject to Phase II were surcharged at $0.60 per Mcf, the nationwide aggregate surcharge would amount to $698 million per year. This figure represents a high value, not likely to be soon attained due to presently depressed residual oil prices. This aggregate cost estimate might be considered reflective of calendar year 1981.

assuming that residual oil prices rise by year-end 1980 to levels experienced in recent months. Table 3 summarizes by industry and by State the effect of an assumed $.60 per Mcf surcharge on Phase II uses. The volume of exempt gas over which the surcharge dollars will be spread to achieve a price reduction will, of course, differ substantially among pipelines and among States. Ignoring such variations, a rough measure of aggregate Phase II impact can be gained by noting that the aggregate surcharge would be spread over approximately 9 Tcf of interstate gas consumption for exempt uses. The result is a price reduction of 7.75 cents per Mcf for these exempt volumes. Thus, a residential customer consuming 130 Mcf per year might save about $10 per year as a result of Phase II. This is in addition to an approximately $8.00 per year savings under the Phase I program if average surcharges equal $0.60 per Mcf.

TABLE 3.—AGGREGATE PHASE II SURCHARGES (INCLUDES AGRICULTURAL AND SMALL USE EXEMPTIONS)

[In thousands of dollars]

| | SIC-28, chemicals | SIC-29, petroleum | SIC-32, stone, clay and glass | SIC-33, primary metals | All other manufacturing | SIC-22 and 26, textiles and pulp and paper, nonexempt | Total [1] |
|---|---|---|---|---|---|---|---|
| Alabama | 1,646 | 730 | 3,854 | 8,709 | 4,516 | 819 | 20,274 |
| Arizona | 125 | | 900 | 6,513 | 583 | 1 | 8,122 |
| Arkansas | 2,049 | 1,372 | 3,886 | 7,930 | 1,626 | 253 | 17,116 |
| California | 2,185 | 23,902 | 15,328 | 4,016 | 7,353 | 380 | 53,164 |
| Colorado | 35 | 397 | 1,882 | 2,258 | 2,012 | 2 | 2,586 |
| Connecticut | | | | 135 | 731 | | 866 |
| Delaware | 61 | 75 | | 86 | 241 | | 463 |
| Florida | 1,833 | 1,337 | 5,319 | 14 | 1,295 | 681 | 10,479 |
| Georgia | 1,691 | 176 | 9,810 | 93 | 2,407 | 2,569 | 16,746 |
| Idaho | 700 | | 27 | | | 38 | 765 |
| Illinois | 3,552 | 2,940 | 10,550 | 18,607 | 16,150 | 133 | 51,932 |
| Indiana | 698 | 640 | 5,220 | 25,467 | 7,495 | 8 | 39,528 |
| Iowa | 2,795 | | 2,965 | 1,309 | 3,069 | 8 | 10,146 |
| Kansas | 2,734 | 18,382 | 7,639 | 10 | 2,769 | 6 | 31,540 |
| Kentucky | 167 | 968 | 1,217 | 2,808 | 2,251 | 366 | 7,787 |
| Louisiana | 35,449 | 26,593 | 2,941 | 4,582 | 8,319 | 112 | 77,996 |
| Maryland | 250 | | 1,544 | 2,573 | 1,155 | 3 | 5,525 |
| Massachusetts | 10 | 2 | 666 | | 1,570 | 71 | 2,319 |
| Michigan | 1,504 | 1,031 | 4,069 | 9,302 | 38,314 | 147 | 54,367 |
| Minnesota | 18 | 260 | 618 | 6,909 | 750 | 26 | 8,581 |
| Mississippi | 721 | 624 | 2,252 | 16 | 2,615 | 123 | 6,351 |
| Missouri | 833 | 519 | 3,618 | 209 | 5,225 | 3 | 10,407 |
| Montana | 17 | 551 | 970 | 1,714 | 256 | 22 | 3,530 |
| Nebraska | 1,648 | | 934 | 36 | 417 | | 3,035 |
| Nevada | 142 | | 951[2] | 34 | 41 | | 1,168 |
| New Hampshire | | | | | | 19 | 19 |
| New Jersey | 214 | 10 | 5,741 | 344 | 1,623 | 75 | 8,007 |
| New York | 483 | | 3,455 | 3,501 | 7,195 | 95 | 14,729 |
| North Carolina | 391 | | 1,930 | 63 | 430 | 711 | 3,545 |
| North Dakota | | 37 | 7 | | | | 44 |
| Ohio | 2,574 | 1,790 | 15,988 | 29,110 | 14,174 | 141 | 63,777 |
| Oregon | 303 | 181 | 461 | 901 | 2,561 | 71 | 4,478 |
| Pennsylvania | 53 | 7,305 | 13,717 | 32,621 | 14,537 | 101 | 68,334 |
| Rhode Island | | | 515 | 22 | | 25 | 562 |
| South Carolina | 105 | | 6,492 | 1,591 | 2,732 | 1,423 | 12,343 |
| South Dakota | | | 619 | | 40 | | 659 |
| Tennessee | 2,722 | 106 | 4,610 | 1,169 | 3,010 | 229 | 11,846 |
| Utah | 316 | 863 | 1,004 | 4,384 | 347 | | 6,914 |
| Vermont | | | | | 160 | 4 | 164 |
| Virginia | 709 | | 860 | 176 | 983 | 308 | 3,036 |
| Washington | 400 | 1,683 | 40 | 1,928 | 254 | 69 | 4,374 |
| West Virginia | 1,372 | 135 | 6,665 | 2,388 | 523 | | 11,083 |
| Wisconsin | 39 | 35 | 1,094 | 999 | 7,301 | 120 | 9,588 |
| Wyoming | 748 | 664 | 224 | | | 1 | 1,637 |
| Total | 71,292 | 93,308 | 150,582 | 182,547 | 167,040 | 9,163 | 674,726 |

[1] Total reflects elimination of several large industrial facilities identified as using intrastate gas.

*B. Macroeconomic Effects of Phase I*

A large number of commenters have alleged that incremental pricing in general, and Phase II in particular, will be inflationary. The basis for this allegation is that incrementally priced industrial customers will simply raise the prices of their products to offset their increased energy costs. As cost increases are passed through the economy, it is argued that the aggregate impact is amplified through operation of a multiplier effect. The consumer, it is argued, will pay in the long run for such cost increases associated with incremental pricing.

At the forefront of the inflation debate has been a study performed for the AGA by Wharton Econometric Forecasting Associates. The Wharton econometric model has been run a number of times under different assumptions concerning Phase II. The initial run compared the effects of Phase II to a base case of Phase I only. In this analysis, Phase II was expected to bring 90 percent of all interstate industrial natural gas under incremental pricing. The Wharton analysis also assumed a ceiling price based on No. 2 oil, with no downward adjustments, for all Phase II users. Finally, the model incorporated a modified passthrough mechanism that allocated spillover from the surcharge account to all users, thus pushing non-exempt users above their alternative fuel price ceiling and frequently off the gas system. Given such a set of assumptions, it is not surprsing that the AGA/Wharton study finds serious adverse impacts attributable to Phase II. Inflation and unemployment rate were predicted to worsen significantly. But this study cannot be considered a useful assessment of the probable effects of the final rule. The model was rerun with a three-tier price ceiling scenario as part of AGA's final submission in this docket. Even this revised assumption considerably overstates the direct cost impact of Phase II because the Commission's final rule sets a uniform ceiling based on residual oil prices for Phase II users.

Notwithstanding the accuracy of these specific input assumptions, other commenters have voiced concerns with the applicability of large scale macroeconomic models for analysis of the effects of a program such as incremental pricing. The Office of Policy and Evaluation of the Department of Energy filed comments which disputed many of the AGA assertions. The DOE analysis maintains that many industrial firms are constrained by competitive pressures and cannot fully pass along increased costs. Moreover, other inputs to industrial production such as exempt gas volumes and electricity generated from gas will benefit from incremental pricing. The commercial sector, a major component of the nation's economy, benefits directly from incremental pricing. DOE projected that if relatively little load loss occurs the net inflationary effect of incremental pricing will be small and possibly negative. However, the DOE submission also indicates that some inflationary impact could result if substantial load loss occurs.

Perhaps more important for purposes of assessing aggregate inflationary pressures arising from Phase II is the total impact in industrial fuel use patterns and pipeline load factors as a result of Phase II. The DOE comments maintain that loss of an individual gas customer to oil is not inflationary per se, and may have little or

no inflationary impact if the gas is used by other customers. As long as some users are being curtailed, no aggregate load loss, and therefore no increase in gas delivery costs, will result from Phase II.

As a further step in their submission, DOE performed a macroeconomic analysis of Phase II similar to that performed by AGA. Stressing their contention that macroeconomic models are ill-suited for analyzing the impact of price changes of a single commodity, DOE ran a different model, Data Resources, Inc. (DRI), with the same set of input assumptions as AGA. The results of the two models are strikingly different. The DRI model projects a rate of inflation only slightly higher than under rolled-in pricing until 1985, at which point there would be a slight reduction in the rate of inflation.[17] By 1990, the model actually predicts somewhat less inflation overall as compared to a rolled-in pricing base case. Another run was made to reflect a scenario without significant load loss; the result was essentially the same.

DOE concludes their comments with a critical look at the AGA/Wharton analysis. The direct costs to industry, assuming AGA's estimate of load loss, would amount to $29 billion in 1990. Costs to other sectors of the economy, such as residential and commercial, decline by $16 billion in the same year when compared to rolled-in pricing. The net effect is a $13 billion price increase, in 1990 dollars. This direct price increase is compared by DOE to the tremendous $431 billion increase in inflation projected by the Wharton macroeconomic model. The DOE analysts express doubt that the implicit multiplier of 33, reflecting the assumption that $1 of direct cost increase to industry results in $33 of increased cost to final consumers, could possibly be correct.

The Council on Wage and Price Stability also filed comments in this docket. The Council's submission contains a detailed record of meetings with AGA and DOE technical staff. The record reveals a rejoinder to the DOE analysis submitted to the Council by Wharton. Yet another document submitted by DOE critically examines this rejoinder and questions the validity of its conclusions. This DOE submission provides further comment on the validity of using large-scale macroeconomic forecasting models to analyze the impacts of Phase II. In short, DOE analysts do not believe that any such model currently available is sufficiently detailed and appropriately structured for the task.

The Council notes the sharp disagreement concerning the inflation issue, but nevertheless indicates a belief that the short-term effects of Phase II should be either negligible or anti-inflationary. The Council is skeptical of the extreme inflationary impacts alleged by AGA/Wharton. Finally, the Council echoes DOE's contention that macroeconomic models are poorly suited to such uses as predicting the impact of price changes in a sub-sector of the economy.

In conclusion, the case for a large inflationary impact must be regarded as speculative, even assuming large surcharges to non-exempt users and significant load loss. The Commission notes that the surcharges in the 60 cent per Mcf range which result from the No. 6 oil

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[17] Inflation as measured by the GNP implicit price deflator. Measured by the Consumer Price Index (CPI), inflation is lower throughout the period in the incremental pricing case.

price ceiling are far less than the $3.00 surcharges which might have resulted from use of a No. 2 oil based ceiling. The small use exemption will lower the effective average surcharge to about 50 cents per Mcf. Finally, the structure of the small use exemption will work to encourage conservation and ultimately may reduce inflation by pricing marginal use of gas closer to its replacement cost. (Natural Gas Policy Act of 1978, Pub. L. 95-621, 92 Stat. 3350, 15 U.S.C. 3301, et seq.)

In consideration of the foregoing, if neither House of Congress passes a Resolution of Disapproval of the regulations transmitted to them in this Order within 30 days of Congressional review, as determined in accordance with section 507(b) of the NGPA, Part 282 of Subchapter I, Chapter I, Title 18, Code of Federal Regulations, is amended as set forth below, effective 90 days following the expiration of the 30-day review period, provided that §§ 282.215, 282.601 and 282.602 shall be effective July 1, 1980.

By Direction of the Commission.

(SEAL) ——— ———, *Secretary.*

1. The table of sections for Part 282 is amended to add a new § 282.208 entitled "*Exemptions under section 502(c)*" and a new § 282.215 entitled "*Exemption affidavits.*"

2. Section 282.101 is amended to read as follows:

§ 282.101 *Purpose.*

The purpose of this part is to set forth incremental pricing rules in accordance with Title II of the Natural Gas Policy Act of 1978. The rules require that certain costs of acquiring natural gas be passed through as surcharges on sales of natural gas used as specified in the rules.

3. Section 282.102 is amended in paragraph (a) to read as follows:

§ 282.102 *Applicability and effective date.*

(a) *Uses.*—(1) Natural gas used as boiler fuel in industrial boiler fuel facilities on and after January 1, 1980, shall be subject to incremental pricing under this part.

(2) (i) On and after [90 days following expiration of 30-day Congressional review period], natural gas consumed in uses other than as boiler fuel in industrial facilities shall be subject to incremental pricing under this part.

(ii) Shrinkage volumes removed as natural gas liquids or natural gas liquid products from a natural gas stream shall not be subject to incremental pricing under this part.

(b) *Discretionary exemptions.*—Petitions for an exemption under authority of section 206(d) of the NGPA may be filed in the manner prescribed in § 282.206.

6. Section 282.203 is amended to read as follows:

§ 282.203 *Exempt end-uses.*

(a) *Statutory exemptions.*—In accordance with the provisions of section 206 of the NGPA, natural gas used for the following purposes shall be exempt from incremental pricing under this part:

(1) all gas used for boiler fuel by an industrial boiler fuel facility which was:

(i) in existence on November 9, 1978; and

(ii) * * *
(2) * * *
(3) all gas used in a school, hospital, or similar institution;
(4) all gas used for the generation of electricity by an electric utility; and
(5) all gas used in a qualifying cogeneration facility.
(b) *Partial exemption for non-boiler fuel use.*—That volume of natural gas consumed in uses other than as boiler fuel by an industrial facility which is not exempt from incremental pricing pursuant to paragraphs (a)(2) through (a)(5) and which is equal to or less than an average of 300 Mcf per day during any month shall be exempt from incremental pricing under this part.

7. Section 282.204 is deleted in its entirety.

8. Section 282.206 is amended in paragraph (a) by deleting the words "boiler fuel" from the term "industrial boiler fuel facility."

9. Section 282.207 is amended in paragraph (a) by deleting the words "boiler fuel" from the term "industrial boiler fuel facility."

10. Part 282 is amended to add a new section 282.208 to read as follows:

§ 282.208 *Exemptions under section 502(c).*

(a) *General rule.*—The Commission may, under authority of section 502(c) of the NGPA, exempt any non-exempt industrial facility (or category thereof), in whole or in part, from any provision of this part.
(b) *Procedures.*—The procedures set forth in § 1.41 shall apply to an application for an exemption in the nature of an adjustment as described in paragraph (a).

11. Part 282 is amended to add a new § 282.215 to read as follows:

§ 282.215 *Exemption affidavits.*

(a) *General.*—This section establishes procedures by which owners or operators of industrial facilities may obtain an exemption for natural gas used for the purposes described in § 282.203.
(b) *Obtaining an exemption.*—(1) In order to obtain a partial or total exemption from incremental pricing, an owner or operator of an industrial facility shall file an exemption affidavit, as described in paragraph (b)(3), signed and dated by a responsible official associated with the facility, under oath, with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, and send a copy of the executed affidavit to the natural gas supplier serving the industrial facility.
(2) *Commission to provide exemption affidavits.*—The Commission will provide exemption affidavits as described in paragraph (b)(3) to natural gas suppliers and to any other interested person upon request. Requests should be directed to the Division of Public Information, Federal Energy Regulatory Commission, Room 1000, 825 North Capitol Street, N.E., Washington, D.C. 20426.
(3) *Contents of exemption affidavits.*—(i) The exemption affidavit will provide the owner or operator of an industrial facility with the opportunity to respond to a series of questions so that the owner or operator may establish, if appropriate, the basis for one or more of the exemptions set forth in § 282.203.

(ii) The exemption affidavit will indicate the record retention obligation which may be incurred by the customer under paragraph (b)(7).

(4) *Effect of filing an exemption affidavit.*—If the owner or operator of an industrial facility files an executed affidavit in accordance with paragraph (b)(1), that volume of natural gas which is consumed in the facility for exempt uses shall be exempt from incremental pricing under this part, if determined in accordance with § 282.504(c)(2)(ii).

(5) *Availability from natural gas suppliers.*—(i) *Initial service.*—Not later than July 1, 1980, each natural gas supplier shall mail or otherwise supply an exemption affidavit, as described in paragraph (b)(3), to the owner or operator of each industrial facility on such natural gas supplier's system.

(ii) *Respones date.*—Natural gas suppliers which supply exemption affidavits under clause (i) shall request that executed affidavits be filed on or before August 1, 1980, in accordance with paragraph (b)(1).

(iii) *Ongoing availability.*—After July 1, 1980, natural gas suppliers shall make exemption affidavits available at their principal place of business on an ongoing basis during regular business hours.

(6) *Effective date of exemption.*—(i) If the owner or operator of an industrial facility files an exemption affidavit with the Commission and sends a copy to the facility's natural gas supplier in accordance with paragraph (b)(1) on or before [one day prior to day 90 days following expiration of 30-day Congressional review period], the facility shall be exempt from incremental pricing in accordance with this part as of [90 days following expiration of 30-day Congressional review period].

(ii) If the owner or operator of an industrial facility files an exemption affidavit with the Commission and sends a copy to the facility's natural gas supplier in accordance with paragraph (b)(1) on or after [same date as in clause (i) above], the facility shall be exempt from incremental pricing under this part as of the beginning of the first full month following the date the exemption affidavit is filed with the Commission and received by the facility's natural gas supplier.

(7) *Record retention.*—If the owner or operator of an industrial facility obtains an exemption by filing an affidavit in accordance with paragraph (b)(1), the owner or operator shall, for a period of at least three years from the date of filing the exemption affidavit, retain all records, documents or data which formed the bases of the responses on the affidavit.

(c) *Public availability of exemption information.*—

(1) *Executed exemption affidavits.*—Copies of executed exemption affidavits which are filed with the Commission shall be available for public inspection through the Division of Public Information, Federal Energy Regulatory Commission, Room 1000, 825 North Capitol Street, N.E., Washington, D.C. 20426.

(2) *Lists of non-exempt facilities.*—(i) On or before November 1, 1980, each natural gas supplier shall file with the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E. Washington, D.C. 20426, and with each state or local regulatory authority having appropriate jurisdiction over the supplier, a list of all indus-

trial facilities served directly by the supplier which did not qualify for an exemption for their total use of natural gas as of [one day prior to day 90 days following expiration of 30-day Congressional review period].

(ii) On or before November 1 of each year after 1980, each natural gas supplier shall file with the agencies specified in clause (i) a revised list of all non-exempt industrial facilities served directly by the supplier. A revised list shall indicate all additions or revisions to or deletions from the prior year's list.

(iii) Lists of non-exempt industrial facilities filed in accordance with clause (i) or (ii) shall indicate the alternative fuel capability of each facility thereon, as established in accord with the provisions of § 282.403.

(iv) Lists of non-exempt facilities filed in accordance with clause (i) or (ii) shall be available for public inspection through the Division of Public Information, Federal Energy Regulatory Commission, Room 1000, 825 North Capitol Street, N.E., Washington, D.C. 20426.

(d) *Protests.*—(1) Any interested person may protest the exemption of an industrial facility from incremental pricing.

(2) The procedures set forth in § 1.10 shall govern the filing of such a protest, except that any person filing such a protest shall serve a copy of the protest on the affiant of the exemption affidavit.

(3) The affiant may file an answer to any protest. Such answer must be filed within 30 days of the service date of a protest. The affiant shall serve a copy of the answer on the party filing the protest.

12. Section 282.401 is amended by deleting the words "boiler fuel" and §§ 282.402 through 282.405 are amended by deleting the words "boiler fuel" wherever they appear in the phrase "industrial boiler fuel facility(ies)."

13. Section 282.501 is amended by deleting the words "boiler fuel" wherever they appear in the phrase "industrial boiler fuel facility(ies)" in paragraphs (c) and (c)(2) and by revising paragraphs (c)(3) and (d) to read as follows:

§ 282.501 *General rule.*

* * * * * * *

(c) * * *

(3) The maximum surcharge absorption capability of a non-exempt industrial facility for any calendar month shall be determined by utilizing the alternative fuel price ceiling(s) applicable to that calendar month and the meter reading(s) made during the meter reading period beginning on the 20th day of such month. If more than one meter reading is made in a meter reading period, a cumulative total of all meter readings made in such period shall be determined.

(d) Each month, in the case of interstate pipelines, the amount accumulated in the pipeline's unrecovered incremental gas costs account which cannot be recovered by way of incremental pricing surcharges shall be cleared from that account to account 805.2, Incremental Gas Cost Adjustments, in accordance with § 282.502.

14. Section 282.503 is amended by deleting the words "boiler fuel" from the term "industrial boiler fuel facilities" in paragraphs (a)(2)(ii) and (c) and by revising paragraph (b) to read as follows:

§ 282.503 *PGA reduction.*

* * * * * * *

(b) *Projected MSAC of a nonexempt industrial facility.*—(1) The projected MSAC of a nonexempt industrial facility for a coming PGA period shall be calculated by a natural gas supplier in accordance with the following formula, in which the symbol "^" indicates a projection:

$$\hat{M}=\frac{[(\hat{A}B_1-\hat{R}B_1)\hat{V}B_1+(\hat{A}S_1-\hat{R}S_1)\hat{V}S_1]}{1+\hat{T}_1}+$$

$$\frac{[(\hat{A}B_2-\hat{R}B_2)\hat{V}B_2+(\hat{A}S_2-\hat{R}S_2)\hat{V}S_2]}{1+\hat{T}_2}+$$

$$\frac{[(\hat{A}B_n-\hat{R}B_n)\hat{V}B_n+(\hat{A}S_n-\hat{R}S_n)\hat{V}S_n]}{1+\hat{T}_n}$$

where:

$\hat{M}$ = Projected MSAC of the non-exempt industrial facility.

$\hat{A}B$ = Projected alternative fuel price ceiling, plus taxes, for the boiler fuel consumed in a non-exempt use by the industrial facility, as determined in accordance with paragraph (b)(2)(i).

$\hat{R}B$ = Projected rate per million Btu's (excluding any incremental pricing surcharge), plus taxes, at which the industrial facility will purchase natural gas for non-exempt boiler fuel use, as determined in accordance with paragraph (b)(3)(i).

$\hat{V}B$ = Projected volume of natural gas (at 1,000 Btu's per cubic foot) that the industrial facility will purchase from the natural gas supplier and use for non-exempt boiler fuel, as estimated for each of the months "1" (one) through "n" of the PGA period.

$\hat{A}S$ = Projected alternative fuel price ceiling, plus taxes, for all natural gas consumed in a non-exempt use other than as boiler fuel by an industrial facility, as determined in accordance with paragraph (b)(2)(ii).

$\hat{R}S$ = Projected rate per million Btu's (excluding any incremental pricing surcharge), plus taxes, at which the industrial facility will purchase natural gas for consumption in a non-exempt use other than as boiler fuel, as determined in accordance with paragraph (b)(3)(ii).

$\hat{V}S$ = Projected volume of natural gas (at 1,000 Btu's per cubic foot) that the industrial facility will purchase from the natural gas supplier in excess of otherwise exempt volumes and an average of 300 Mcf per day and consume in a use other than as boiler fuel, as estimated for each of the months "1" (one) through "n" of the PGA period.

$\hat{T}$ = Projected total percentage tax rate reflecting any state and local taxes applicable to an incremental pricing surcharge.

$n$ = Last month of the PGA period.

(2) *Projected alternative fuel price ceilings.*—(i) *Nonexempt boiler fuel use.*—As a value for "ÂB" for each of the months "1" (one) through "n" of the coming PGA period, a natural gas supplier shall use the most recently established alternative fuel price ceiling applicable to the facility's non-exempt boiler fuel use, plus taxes, unless the supplier elects to estimate the applicable alternative fuel price ceilings for each each month. In that case, the estimated ceilings, plus taxes, may be used as values for "ÂB".

(ii) *Non-exempt use other than boiler fuel.*—As a value for "ÂS" for each of the months "1" (one) through "n" of the coming PGA period, a natural gas supplier shall use the most recently established alternative fuel price ceiling applicable to the non-exempt use of gas other than as boiler fuel in the facility, plus taxes, unless the supplier elects to estimate the applicable alternative fuel price ceilings for each month. In that case, the estimated ceilings, plus taxes, may be used as values for "ÂS".

(iii) *Assistance for local distribution companies.*—If a local distribution company desires assistance in estimating applicable alternative fuel price ceilings for each of the months of the coming PGA period, the interstate pipeline which supplies the local distribution company shall provide such assistance.

(3) *Projected rates.*—(i) *Local distribution company.* (A) *Non-exempt boiler fuel use.*—As a value for "RB" for each of the months "1" (one) through "n" of the coming PGA period, a local distribution company shall use its effective boiler fuel industrial gas sales rate per million Btu's at the time of projection, plus taxes, but exclusive of any incremental pricing surcharges, unless the local distribution company elects to adjust such rate to reflect general rate changes which it is known will occur during the PGA period under authority of a state or local regulatory body. If the local distribution company elects to adjust the rate, the values used for "RB" may reflect the adjustments for the months of the PGA period for which the adjustments are appropriate.

(B) *Non-exempt use other than boiler fuel.*—As a value for "RS" for each of the months "1" (one) through "n" of the coming PGA period, a local distribution company shall use its effective non-boiler fuel industrial gas sales rate per million Btu's at the time of projection, plus taxes, exclusive of any incremental pricing surcharges, unless the local distribution company elects to adjust such rate to reflect general rate changes which it is known will occur during the PGA period under authority of a state or local regulatory body. If the local distribution company elects to adjust the rate, the values used for "RS" may reflect the adjustments for the months of the PGA period for which the adjustments are appropriate.

(ii) *Interstate pipeline.*—(A) *Non-exempt boiler fuel use.*—As a value for "RB" for each of the months "1" (one) through "n" of the coming PGA period, an interstate pipeline shall use its effective boiler fuel industrial gas sales contract rate per million Btu's at the time of the projection, plus taxes, but exclusive of any incremental pricing surcharges, unless the pipeline elects to adjust such rate to reflect rate changes which it is known will occur during the PGA period.

(B) *Non-exempt use other than boiler fuel.*—As a value for "RS" for each of the months "1" (one) through "n" of the coming PGA period, an interstate pipeline shall use its effective non-boiler fuel industrial gas sales contract rate per million Btu's at the time of the projection, plus taxes, but exclusive of any incremental pricing surcharges, unless the pipeline elects to adjust such rate to reflect rate changes which it is known will occur during the coming PGA period.

* * * * * * *

15. Section 282.504 is amended by deleting the words "boiler fuel" from the term "industrial boiler fuel facility(ies)" in paragraphs (a), (c)(1), (c)(3), (c)(4), (d)(2) and (d)(3)(ii), and by revising paragraphs (c)(1) and (c)(2) to read as follows:

§ 282.504 *Incremental pricing surcharge.*

* * * * * * *

(c) *Surcharge on non-exempt industrial facilities.*—(1) * * *

(i) * * *

(ii) * * *

(iii) For the period November 1, 1980, through October 31, 1981, a State may elect to allocate that portion of an industrial facility's surcharge as determined in accord with (i) or (ii) above which is applicable to non-boiler fuel use of natural gas and which exceeds 75 cents per Mcf to other non-exempt industrial facilities within the state.

(2) *MSAC of a non-exempt industrial facility.*—(i) the MSAC of a non-exempt industrial facility for any calendar month shall be determined in accordance with the following formula:

$$M=\frac{[(AB-RB)(VB)+(AS-RS)(VS)]}{1+T}$$

where:

$M$ = MSAC of the non-exempt industrial facility.

$AB$ = Alternative fuel price ceiling, plus taxes, applicable to the boiler fuel consumed in a non-exempt use by the industrial facility during the subject calendar month.

$RB$ = Rate per million Btu's (excluding any incremental pricing surcharge), plus taxes, at which the industrial facility purchased gas for consumption as boiler fuel in a non-exempt use from the natural gas supplier during the month.

$VB$ = Volume of natural gas (at 1,000 Btu's per cubic foot) supplied by the natural gas supplier to the industrial facility for consumption as boiler fuel in a non-exempt use during the month, as determined in accordance with paragraph (c)(2)(ii).

$AS$ = Alternative fuel price ceiling, plus taxes, applicable to consumption of gas in a non-exempt use other than as boiler fuel by the industrial facility during the subject calendar month.

$RS$ = Rate per million Btu's (excluding any incremental pricing surcharge), plus taxes, at which the industrial facility purchased gas for consumption in a non-exempt use other than as boiler fuel during the month.

*VS* = Volume of natural gas (at 1,000 Btu's per cubic foot) supplied by the natural gas supplier and consumed in a use other than as boiler fuel by the industrial facility that is not otherwise exempt and that exceeds an average of 300 Mcf/day during the month, as determined in accordance with paragraph (c)(2)(ii).

*T* = Total percentage tax rate reflecting any state and local taxes applicable to an incremental pricing surcharge.

(ii)(A) For the period January 1, 1980, through October 31, 1981, the volume of natural gas supplied to a non-exempt industrial facility during a month may be determined in accordance with § 282.207.

(B)(*1*) Subject to clause (*2*), on and after November 1, 1981, the non-exempt volume of natural gas supplied by a natural gas supplier to a non-exempt industrial facility during a month shall be deemed to be the total volume of natural gas supplied to the facility during the month, unless the natural gas supplier serving the facility distinguishes the volumes used for non-exempt uses from the volumes consumed in exempt uses on the basis of submeter readings. If volumes consumed in non-exempt uses are so identified, such volumes shall be the basis for determining the MSAC of the industrial facility in accordance with clause (i).

(*2*) Certified monthly estimates determined in accordance with § 282.207 may be utilized to determine the volume of natural gas consumed in the facility for non-exempt uses for a period following November 1, 1981, *provided that* the owner or operator of the facility has obtained a purchase order for all submeters which will be needed in the facility by November 1, 1981, and such submeters will be installed within a reasonable period of time.

* * * * * * *

16. Section 282.506 is amended to read as follows:

§ 282.506 *Refunds.*

(a) *Non-exempt boiler fuel use.*—The jurisdictional portion of any refund (including interest applicable thereto) which is attributable to that portion of service provided to and consumed as boiler fuel for a non-exempt use by industrial facilities prior to January 1, 1980, which had not been flowed through to such users as of December 31, 1979, shall be flowed through as a lump sum payment in appropriate amounts to each appropriate natural gas supplier for the benefit of such users. Such refunds shall be calculated on the basis of sales to such users during the period when the rates which give rise to the refund were in effect.

(b) *Non-exempt use of other than boiler fuel.*—The jurisdictional portion of any refund (including interest applicable thereto) which is attributable to that portion of service provided to and consumed in a non-exempt use other than as boiler fuel by non-exempt industrial facilities prior to [90 days following expiration of 30-day Congressional review period] which has not been flowed through to such users as of [day prior to day 90 days following expiration of 30-day Congressional review period] shall be flowed through as a lump sum payment in appropriate amounts to each appropriate natural gas supplier for the benefit of such users. Such refunds shall be calculated on the basis of

sales to such users during the period when the rates which give rise to the refund were in effect.

17. Section 282.601 is amended in paragraph (c) to read as follows:

§ 282.601 *FERC gas tariff provisions*

* * * * * * *

(c) *Filing dates.*—The incremental pricing surcharge provision and revised PGA provision shall be filed with the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426 and served on all parties by July 1, 1980. The provisions shall become effective on August 1, 1980, unless disapproved in whole or in part by the Commission.

18. Section 282.602 is amended in paragraph (a) to read as follows:

§ 282.602 *Tariff sheets.*

(a) *General rule.*—(1) On or before August 1, 1980, for the period [90 days following expiration of 30-day Congressional review period], to the effective date of the pipeline's next normally scheduled PGA filing, each interstate pipeline shall file concurrently:

(i) a tariff sheet reflecting a reduced PGA rate as determined in accordance with § 282.503; and

(ii) a tariff sheet reflecting the projected incremental pricing surcharges for each month, as determined on the basis of data used in deriving the reduced PGA rates referenced in clause (i), for each of the direct sale non-exempt industrial facilities and the aggregate amount applicable to each sale-for-resale customer on the pipeline's system.

* * * * * * *

19. Section 282.603 is amended in paragraph (a) to read as follows:

§ 282.603 *Informational filings.*

(a) *General rule.*—For informational purposes, each month commencing with September 1980, each interstate pipeline company shall file with the Commission a statement setting forth the incremental pricing surcharge actually billed to each non-exempt industrial facility and sale-for-resale customer on its system in the preceding month.

* * * * * * *

## Appendix A

### Summary of Comments on Phase II Rulemaking

The attached chart is a summary of the oral comments made in the hearings and the written comments submitted in response to the Notice of Proposed Rulemaking in Docket No. RM80-10. The comments have been organized according to interest group.[1]

A total of 522 comments were received on the Phase II proposal. This total includes 347 comments on behalf of industrial end-users: eleven comments from Chambers of Commerce; seven comments on behalf of consumer organizations or individual consumers; thirteen comments on behalf of natural gas liquids extraction plants; and sixteen comments on behalf of pipeline companies. Local distribution companies filed a total of sixty-four comments; sixteen state regulatory Commissions participated in the proceedings; and three Federal agencies submitted comments. Finally, forty-five Congressmen submitted views or formal comments.

Commenters addressed numerous issues inherent in the Phase II proposal. For purposes of this summary, the issues have been grouped into ten major categories. An "X" placed in a column indicates that the commentor discussed at least one issue within that particular category. The ten categories include the following issues:

*Timing.*—includes comments requesting the Commission to delay implementing a Phase II rulemaking because of lack of information on the impact of incremental pricing and/or lack of experience with implementing the Phase I program.

*Scope.*—includes comments requesting the Commission to expand or limit the class of gas users, or the type of gas use covered by incremental pricing.

*No. 2 or No. 6.*—includes comments that recommended a ceiling price to be adopted by the Commission. All except a few of these comments recommended adopting a single tier high sulphur No. 6 ceiling price.

*Market ordering.*—includes comments that expressed the view that the incremental pricing program will not be able to meet its market ordering objectives because it will not be able to restrain pipeline bidding for new supplies of gas.

*Price sheltering.*—includes comments that express the view that the incremental pricing program will not achieve its objective of shielding high priority users. The arguments in support of this position included views that high priority users will not receive a benefit because load loss will result on many systems, causing an increase in rates to the high priority users, and that the increased gas prices paid by incrementally priced industrials will be passed on to the high priority users in the form of higher prices for consumer products.

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[1] Several individuals submitted comments over their own names, arguing an industrial point of view. These comments are included within the "industrial end-user" group.

*Adverse economic impact.*—includes comments indicating that incremental pricing will have any of the following economic impacts: increase inflation, increase unemployment, decrease rate of growth, increase balance of payment deficit, cause plant shutdowns and create competitive disadvantages in the foreign and/or domestic markets.

*Increase oil use.*—includes comments stating that the incremental pricing program will cause fuel switching from gas to oil because the price of gas will be equal to or exceed the price of oil. Thus, U.S. dependence on oil imports will be increased.

*Load loss.*—includes comments that alleged that the incremental pricing program will cause fuel switching from gas to alternative fuels for many industries, which will increase the fixed costs the remaining customers on the gas system will have to bear.

*Conservation.*—includes comments alleging that incremental pricing hides the true cost of gas to high priority users, thus creating a disincentive to conserve.

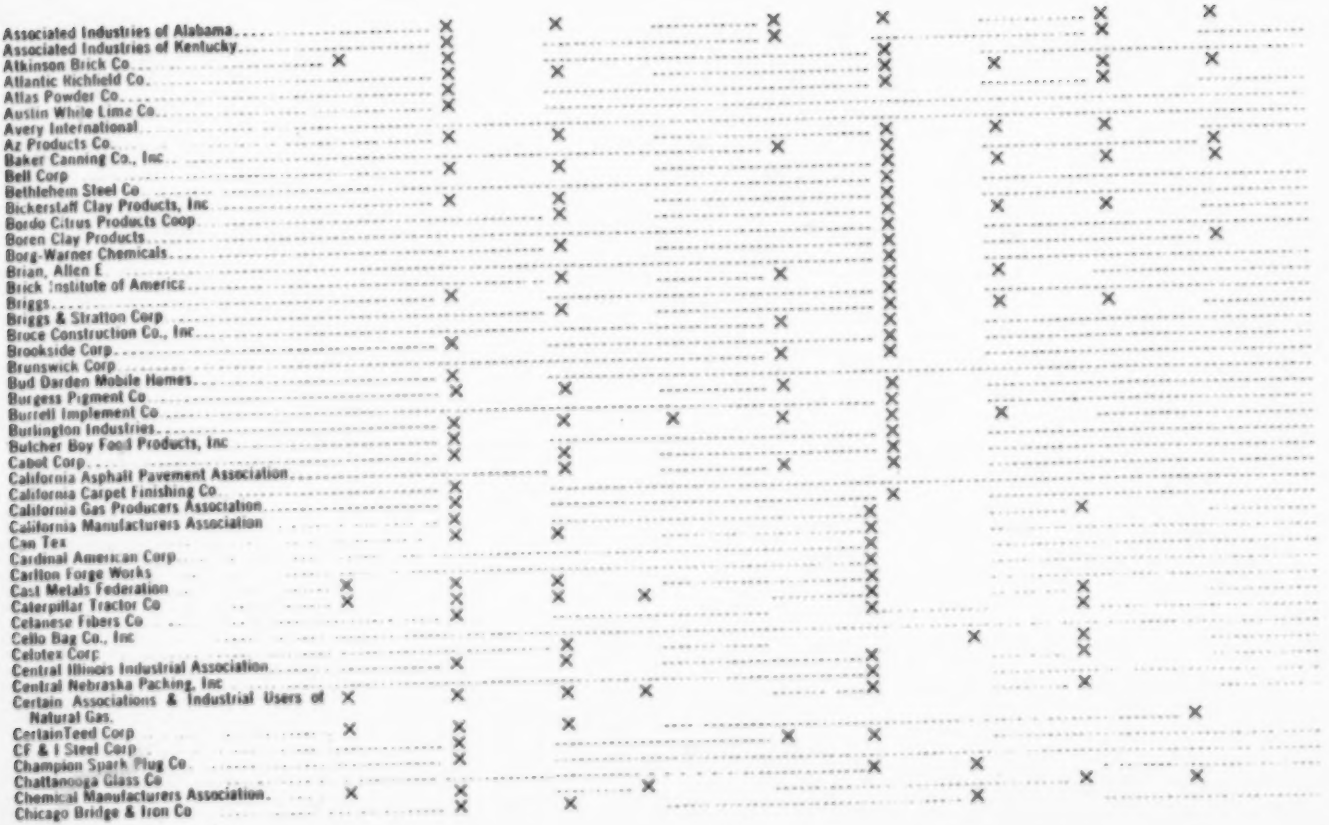
*Keep estimation procedure.*—includes comments opposing a submetering requirement and recommending permanent adoption of an estimation approach. The majority of these comments endorsed the disclosed estimation methodology approach adopted by the Commission in Docket No. RM80-16.

Attachment.

APPENDIX A

SUMMARY OF COMMENTS ON PHASE II RULEMAKING

| | Timing | Scope | No. 2 No. 6 | Market order | Price shelt'g | Adverse economic impact | Incrs. oil use | Load loss | Conservation | Keep estimation procedure |
|---|---|---|---|---|---|---|---|---|---|---|
| **INDUSTRIAL END-USERS** | | | | | | | | | | |
| Acme Brick | | X | X | | | X | | | | |
| Active Products Corp | | X | | | | X | X | | | |
| Adams Packing Association, Inc | | | | | X | X | | | | |
| Advance Products Corp | | | | | X | | X | X | | |
| AF Enterprises | | X | | | | | | | | |
| AFG Industries, Inc | | | | | | X | | X | | |
| Air Products & Chemicals | | X | | | | X | | | | |
| Airco Speer Carbon-Graphite | | X | X | | X | X | X | | | |
| Akrosil | | | X | | | X | | | | |
| Alberta-Culver Co | | | | | X | X | X | X | | |
| Alcoa Aluminum | | | | | | | | | | |
| Alflex Corp | | | | | | X | | | X | |
| Allis Chalmers | | | | | | X | X | X | | |
| Allshouse, Thomas W | | | | | | X | | | | |
| Allsun Juices, Inc | | | | | | X | | | | |
| Aluminum Recycling Association | | X | | | | | | | | |
| American Aluminum Extrusion, Inc | | X | X | | | X | X | | | |
| American Bakers Association | | X | | | | X | | | | |
| American Die Casting Institute | | X | X | X | | X | X | X | X | X |
| American Hot Dip Galvanizing | | X | | | | X | X | | X | |
| American Institute of Plant Engineers | | X | X | | | X | | | | |
| American Iron Ore Association | | X | X | X | | X | X | | | |
| American Meat Institute and Armour & Co | | X | X | | X | X | X | | | |
| American Paper Institute, Inc | | X | X | | | X | | | X | |
| American Standards, Inc | | X | X | X | X | X | | X | | |
| American Textile Manufacturers Institute, Inc | | X | X | X | X | X | X | | X | |
| Ames Co | | | | | X | X | X | | | |
| Amron Corp | | X | | | | | | | | |
| Anaconda Copper Co | | X | X | X | | X | X | | X | |
| Anaheim Citrus Products Co | | X | | | | X | | | | |
| Anchor Hocking Corp | | X | | | | X | X | X | X | |
| Armco Inc | | X | X | | | X | | X | X | |
| Armstrong | | X | | X | X | X | X | X | X | |
| Armstrong Cork | | X | X | | | | | | | |
| Asarco Inc., Deere & Co., Kennecott Copper Corp. | | X | X | X | X | X | | | X | |
| Asset Management Consultant Service, Inc | | X | | | | X | | | | |


Associated Industries of Alabama
Associated Industries of Kentucky
Atkinson Brick Co
Atlantic Richfield Co.
Atlas Powder Co.
Austin White Lime Co.
Avery International
Az Products Co.
Baker Canning Co., Inc
Bell Corp
Bethlehem Steel Co
Bickerstaff Clay Products, Inc
Bordo Citrus Products Coop
Boren Clay Products
Borg-Warner Chemicals
Brian, Allen E
Brick Institute of America
Briggs
Briggs & Stratton Corp
Broce Construction Co., Inc
Brookside Corp.
Brunswick Corp
Bud Darden Mobile Homes
Burgess Pigment Co
Burrell Implement Co
Burlington Industries
Butcher Boy Food Products, Inc
Cabot Corp.
California Asphalt Pavement Association
California Carpet Finishing Co
California Gas Producers Association
California Manufacturers Association
Can Tex
Cardinal American Corp
Carlton Forge Works
Cast Metals Federation
Caterpillar Tractor Co
Celanese Fibers Co
Cello Bag Co., Inc
Celotex Corp
Central Illinois Industrial Association
Central Nebraska Packing, Inc
Certain Associations & Industrial Users of Natural Gas.
CertainTeed Corp
CF & I Steel Corp
Champion Spark Plug Co
Chattanooga Glass Co
Chemical Manufacturers Association.
Chicago Bridge & Iron Co

APPENDIX A—Continued

SUMMARY OF COMMENTS ON PHASE II RULEMAKING

| | Timing | Scope | No. 2 No. 6 | Market order. | Price shelf'g | Adverse economic impact | Incrs. oil use | Load loss | Conservation | Keep estimation procedure |
|---|---|---|---|---|---|---|---|---|---|---|
| **INDUSTRIAL END-USERS** | | | | | | | | | | |
| Chicago Extruded Metals Co. | | X | | | | X | X | | | |
| Chi-Vit Corp. | | | | | X | X | | | X | |
| Cleveland-Cliffs Iron Co. | | X | | | | | | X | | |
| Colonial Rubber Co. | | X | | | X | X | | | | X |
| Columbia Moulding Co. | | | X | | | | | X | | |
| Consolidated Papers, Inc. | | | X | | X | | | X | | |
| Construction Industry Manufacturers Association. | | | | | | X | | X | | |
| Copperweld Tubing Group | | | | | | | | | | |
| Corn Refiners Association, Inc. | | | | | | | | | | |
| Cortland Container Corp. | | X | | | | | | | | |
| Crompton Co., Inc. | | | X | | | | | | | |
| Crown Cork & Seal Co., Inc. | | | X | | | X | X | X | | |
| Dana Corp. | | X | | | X | | | | X | |
| Delta Brick & Tile Co., Inc. | | X | X | | X | X | X | X | | |
| Dickey Co. | | | X | | X | | X | X | X | |
| Dixie Galvanizing & Tank Co. | | | | | | X | X | X | | |
| Dixie Industries, Inc. | | X | | | X | X | | | | |
| D. M. Steward Manufacturing Co. | | | | | | X | | | | |
| Dow Chemical U.S.A. | | X | | X | | | | | X | |
| Dubuque Packing Co. | | X | | | | X | | | | |
| Dundee Citrus Growers Association. | | X | | X | X | X | X | | | |
| Du-wel Products, Inc. | | X | X | | | X | | | | |
| E. I. DuPont de Nemours & Co. | X | X | X | X | | X | | X | X | |
| Eastern Energy User's Coalition. | X | X | | X | | X | | | | |
| ECK Industries, Inc. | | | | | | X | | | | |
| Electrodata Inc. | | X | | | | X | | | | X |
| Eli Lilly & Co. | | X | | | | X | | | | |
| Eljer Plumbingware. | | | | | X | | | X | | |
| Elkay Manufacturing Co. | | | | | X | | | X | | |
| Ellwood City Forge Corp. | | X | | | | X | | | | |
| Elyria Foundry Division. | | X | | | | | | | | |
| Emerson Electric Co. | | X | X | | | X | | | | |
| Enamel Products & Plating Co. | | | | | | | | | | |
| Endicott Forging & Manufacturing Co., Inc. | | | | | | X | | X | | |
| Endicott Clay Products Co. | | | | | | | | | | |
| Entex, Inc. | | | | | X | X | X | X | | |

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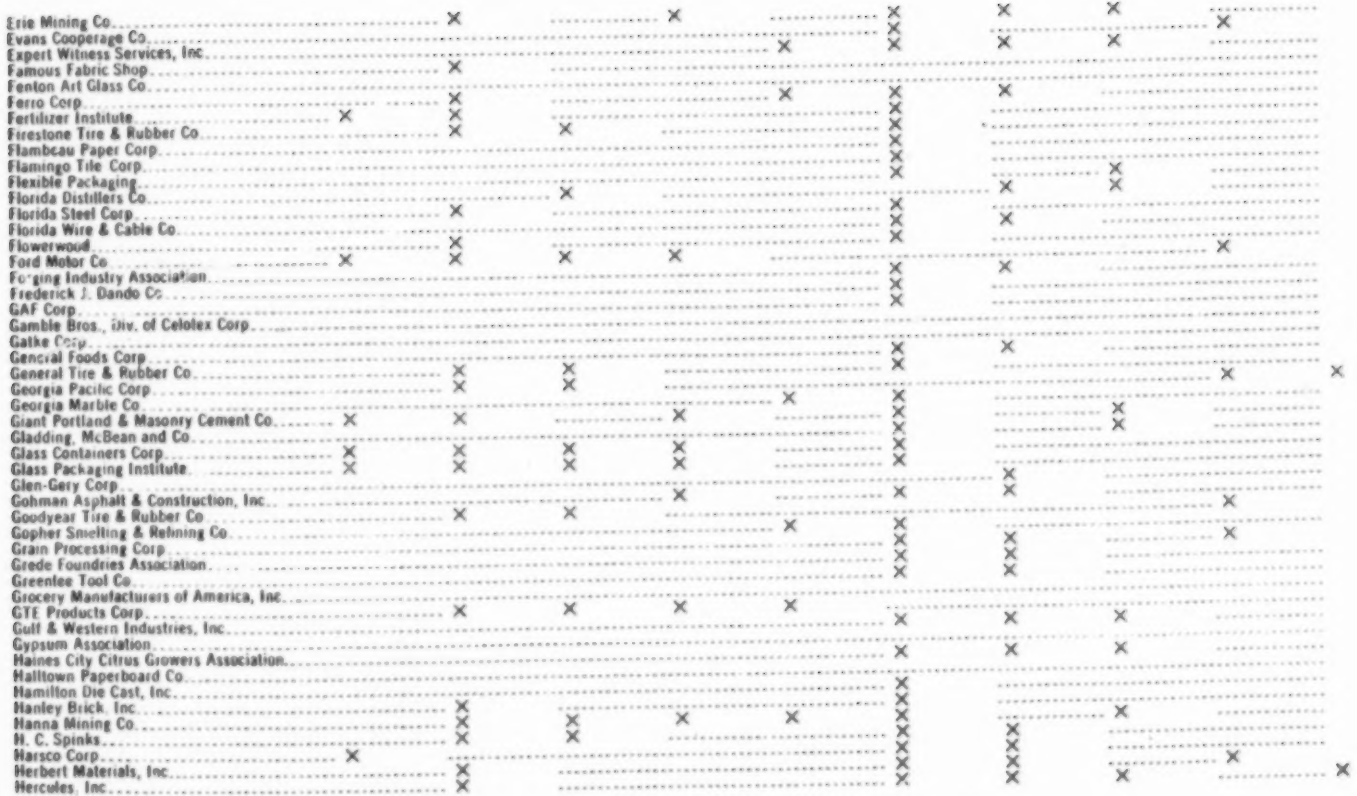
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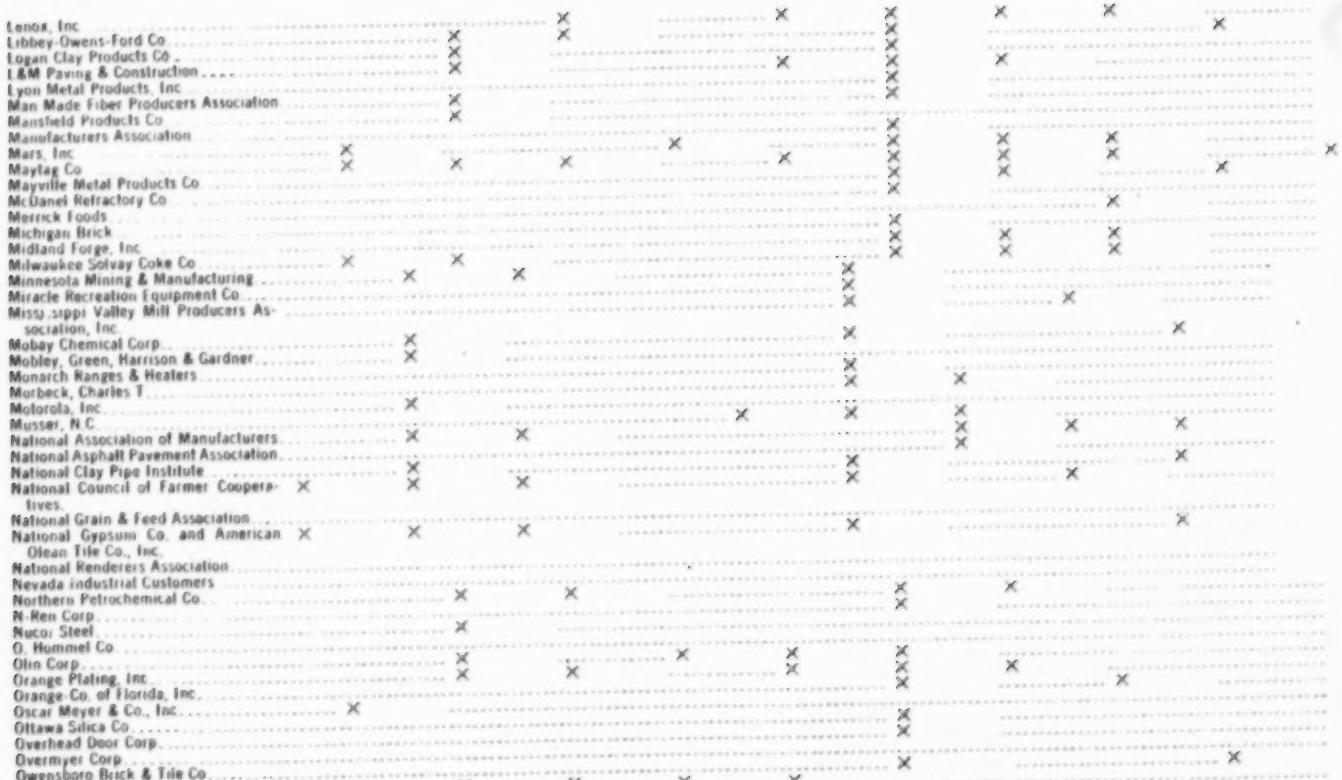
Evans Cooperage Co.
Expert Witness Services, Inc.
Famous Fabric Shop
Fenton Art Glass Co.
Ferro Corp.
Fertilizer Institute
Firestone Tire & Rubber Co.
Flambeau Paper Corp.
Flamingo Tile Corp.
Flexible Packaging
Florida Distillers Co.
Florida Steel Corp.
Florida Wire & Cable Co.
Flowerwood
Ford Motor Co.
Forging Industry Association
Frederick J. Dando Co.
GAF Corp.
Gamble Bros., div. of Celotex Corp.
Gatke Corp.
General Foods Corp.
General Tire & Rubber Co.
Georgia Pacific Corp.
Georgia Marble Co.
Giant Portland & Masonry Cement Co.
Gladding, McBean and Co.
Glass Containers Corp.
Glass Packaging Institute
Glen-Gery Corp.
Gohman Asphalt & Construction, Inc.
Goodyear Tire & Rubber Co.
Gopher Smelting & Refining Co.
Grain Processing Corp.
Grede Foundries Association
Greentee Tool Co.
Grocery Manufacturers of America, Inc.
GTE Products Corp.
Gulf & Western Industries, Inc.
Gypsum Association
Haines City Citrus Growers Association
Halltown Paperboard Co.
Hamilton Die Cast, Inc.
Hanley Brick, Inc.
Hanna Mining Co.
H. C. Spinks
Harsco Corp.
Herbert Materials, Inc.
Hercules, Inc.

APPENDIX A—Continued

SUMMARY OF COMMENTS ON PHASE II RULEMAKING

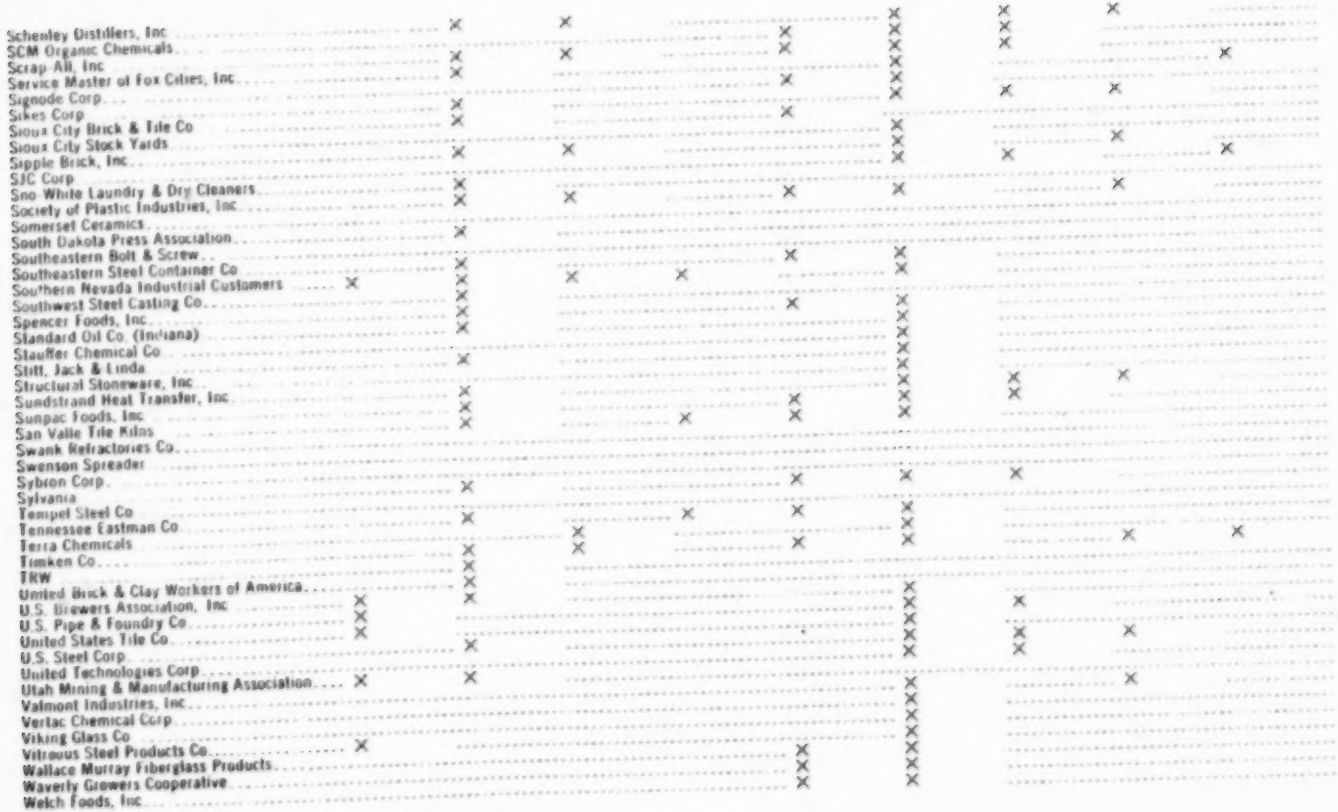
| | Timing | Scope | No. 2 No. 6 | Market order. | Price shelt'g | Adverse economic impact | Incrs. oil use | Load loss | Conservation | Keep estimation procedure |
|---|---|---|---|---|---|---|---|---|---|---|
| **INDUSTRIAL END-USERS** | | | | | | | | | | |
| Homer Laughlin China Co | | | | | | X | | | | |
| Hormel & Co | | | | | | X | X | X | | |
| Hoover Radiator | | X | | | | | | | | |
| Howmet Turbine Components Corp | | | | | | X | | | | |
| Huntington Almoys | X | X | | | | X | X | X | X | |
| Huron Lime Co | | | X | | | | | | | |
| Husky Oil Co | | X | | | | X | | | | |
| Hussey Metals Div., Copper Range Co | | X | X | | | X | | | | |
| Ideal Basic Industries, Inc | | X | X | | | X | | | | |
| Illinois Road Builders Association | | | | | | X | | | | |
| Imperial Glass Corp | | X | | | | X | X | X | | |
| Indiana Farm Bureau Cooperative Association, Inc. | | | | | | | | | | |
| Inland Container Corp | | X | X | | | X | X | X | | |
| Inland Steel Container | | | | | X | X | | | | |
| International Harvester | | X | X | | | X | | | | |
| International Minerals & Chemical Corp | | | | | | X | | | | |
| Interstate Brick & Ceramic Tile | | | | | | X | | | | |
| Janquin Florida Distilling Co | | | X | | X | X | | | | |
| Jessop Steel Co | | | | | | X | | | | |
| Jim Walter Corp | | X | X | | | | X | | | |
| Johns-Manville, Inc., et al | | X | X | X | | X | | X | X | |
| John Morrell & Co. (Estherville plant) | | X | | | | X | | | | |
| Kaiser Aluminum | | X | X | | | X | X | | | |
| Kennecott Copper Corp | | | | X | X | X | X | | | |
| Kenosha Beef | | | | | | | | | | |
| Kent Castings Corp | | | | | | | | | | |
| Kimberly-Clark Corp | X | | X | | | X | X | X | | X |
| Knauf Fiberglass | | X | X | | X | | | | | |
| Knudsen Corp | | | | | X | X | | | X | |
| Koppers Co | X | X | | | | X | | | | |
| Korf Industries, Inc | | X | | | | X | X | X | | |
| Kropp Forge Co., Div., of Anadite, Inc | | X | | | | X | | | | |
| Ladish Co | | | X | | | X | X | | | |
| Lake Wales Citrus Growers Association | | | | | X | | X | X | | |
| Larsen Co | X | X | | X | X | X | | X | X | |
| LaSalle Steel Co | | X | X | X | | X | | | | |


Lenox, Inc
Libbey-Owens-Ford Co
Logan Clay Products Co
L&M Paving & Construction
Lyon Metal Products, Inc
Man Made Fiber Producers Association
Mansfield Products Co
Manufacturers Association
Mars, Inc
Maytag Co
Mayville Metal Products Co
McDaniel Refractory Co
Merrick Foods
Michigan Brick
Midland Forge, Inc
Milwaukee Solvay Coke Co
Minnesota Mining & Manufacturing
Miracle Recreation Equipment Co
Mississippi Valley Mill Producers Association, Inc
Mobay Chemical Corp
Mobley, Green, Harrison & Gardner
Monarch Ranges & Heaters
Morbeck, Charles T
Motorola, Inc
Musser, N C
National Association of Manufacturers
National Asphalt Pavement Association
National Clay Pipe Institute
National Council of Farmer Cooperatives
National Grain & Feed Association
National Gypsum Co. and American Olean Tile Co., Inc.
National Renderers Association
Nevada Industrial Customers
Northern Petrochemical Co
N-Ren Corp
Nucor Steel
O. Hommel Co
Olin Corp
Orange Plating, Inc
Orange Co. of Florida, Inc
Oscar Meyer & Co., Inc
Ottawa Silica Co
Overhead Door Corp
Overmyer Corp
Owensboro Brick & Tile Co
Owens-Corning Fiber Glass Corp

APPENDIX A—Continued

SUMMARY OF COMMENTS ON PHASE II RULEMAKING

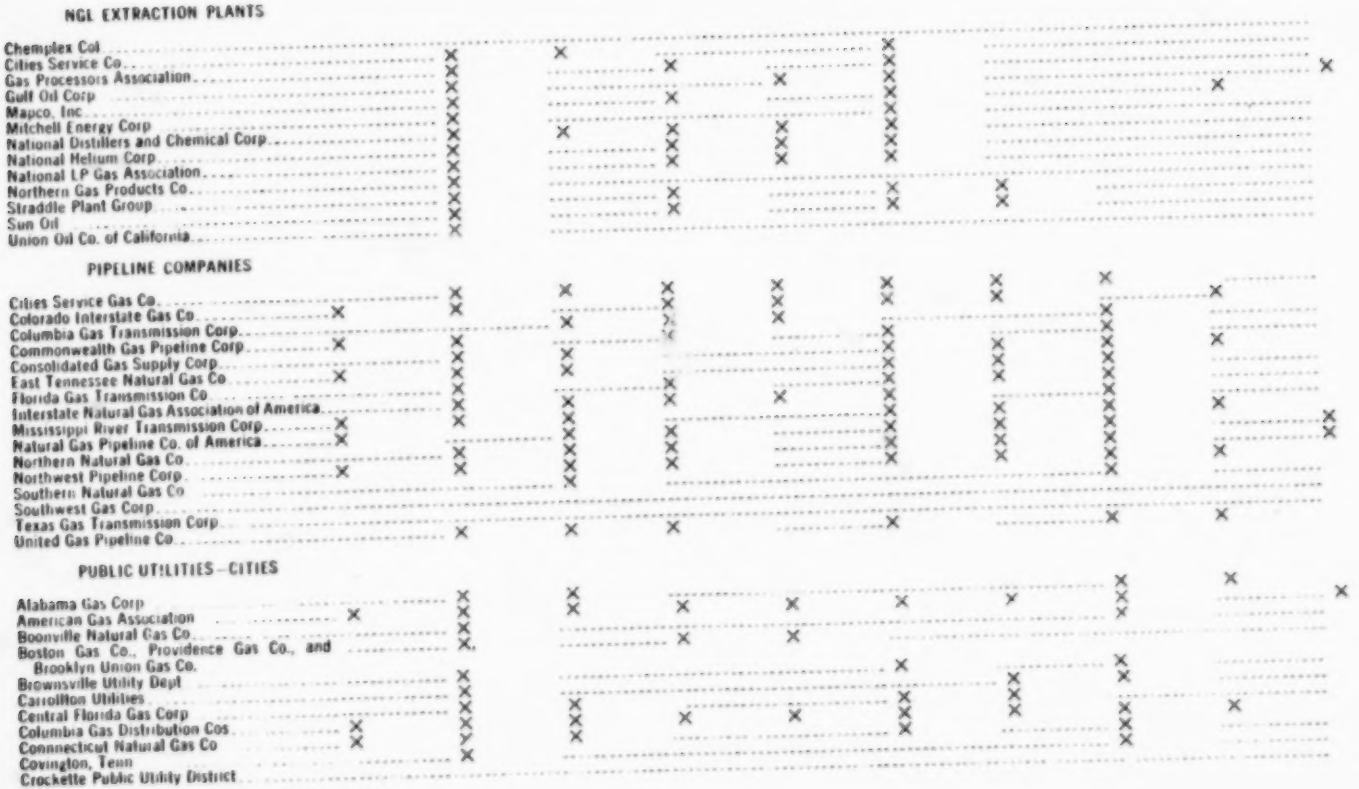
| | Timing | Scope | No. 2 No. 6 | Market order. | Price shelf'g | Adverse economic impact | Incrs. oil use | Load loss | Conservation | Keep estimation procedure |
|---|---|---|---|---|---|---|---|---|---|---|
| **INDUSTRIAL END-USERS** | | | | | | | | | | |
| Owens-Illinois | | | | | X | X | | X | | |
| Parker Hannifin Corp. | | | | | | | | | | |
| Paul Krone Diecasting, Inc. | | | | | | | | | | |
| Peat Manufacturing Co. | | | | | | X | | | X | |
| Perstorp, Inc. | | | X | | | X | X | | | |
| Petrochemical Energy Group | X | X | X | X | | | | | | |
| Pfaltzgraff Co. | | | | | | X | X | | X | |
| Pharr Yarns Corp. | | X | | | | X | X | | | |
| Phelps Dodge Corp. | | X | X | | | | | | | |
| Pickard, Inc. | | X | | | | X | | | | |
| Plantmix Asphalt | | X | | | | | | | | |
| Porcelain Enamel Inst., Inc. | | X | X | | | X | X | X | | |
| Port Costa Products Co. | | | | | | X | | | | |
| Potters Industries, Inc. | | X | | | | X | | | | |
| PPG Industries, Inc. | | | | | | X | | | | |
| Process Gas Consumers Group et al. | X | X | X | X | X | X | X | X | X | X |
| Proctor & Gamble | X | X | | X | | X | | X | X | |
| Productol Chemical Div. | | | | | | X | | X | | |
| Quaker Oats Co. | | X | X | | | | | | | |
| Rachelle Laboratories | | | | | | X | | | X | |
| Reedsburg Foods Corp. | | | | | X | X | X | X | | |
| Reeves Southeastern Corp. | | X | X | | X | X | X | | | |
| Refractories Institute | | | | | X | X | X | | | |
| Reichold Chemicals, Inc. | | | | | X | X | | | | |
| Reliance Clay Products | | | | | X | X | X | | | |
| Remington Arms Co., Inc. | | X | | | | | | | | |
| Renninger, Richard D. | X | | | | | | X | | | |
| Republic Steel Corp. | | X | | | | X | | | X | X |
| Reserve Mining Co. | | X | X | | | X | | | | |
| Rex of Florida, Inc. | | X | X | | | X | X | | | |
| Reynolds Aluminum | X | X | | | | | X | | | |
| RMI Titanium Co. | | X | | | | X | X | X | X | |
| Roberts Bros., Inc. | | | | | | X | X | | | |
| Rockwood Industries | | X | | | | X | | X | X | |
| R. R. Donnelley & Sons Co. | | | | X | | X | | | X | |
| St. Joe Paper Co. | | X | | X | X | X | X | | | |
| SBS | | X | | | | X | | | | |


Schenley Distillers, Inc
SCM Organic Chemicals
Scrap-All, Inc
Service Master of Fox Cities, Inc
Signode Corp
Sikes Corp
Sioux City Brick & Tile Co
Sioux City Stock Yards
Sipple Brick, Inc
SJC Corp
Sno White Laundry & Dry Cleaners
Society of Plastic Industries, Inc
Somerset Ceramics
South Dakota Press Association
Southeastern Bolt & Screw
Southeastern Steel Container Co
Southern Nevada Industrial Customers
Southwest Steel Casting Co
Spencer Foods, Inc
Standard Oil Co. (Indiana)
Stauffer Chemical Co
Stitt, Jack & Linda
Structural Stoneware, Inc
Sundstrand Heat Transfer, Inc
Sunpac Foods, Inc
San Valle Tile Kilns
Swank Refractories Co
Swenson Spreader
Sybron Corp
Sylvania
Tempel Steel Co
Tennessee Eastman Co
Terra Chemicals
Timken Co
TRW
United Brick & Clay Workers of America
U.S. Brewers Association, Inc
U.S. Pipe & Foundry Co
United States Tile Co
U.S. Steel Corp
United Technologies Corp
Utah Mining & Manufacturing Association
Valmont Industries, Inc
Vertac Chemical Corp
Viking Glass Co
Vitreous Steel Products Co
Wallace Murray Fiberglass Products
Waverly Growers Cooperative
Welch Foods, Inc

APPENDIX A

SUMMARY OF COMMENTS ON PHASE II RULEMAKING

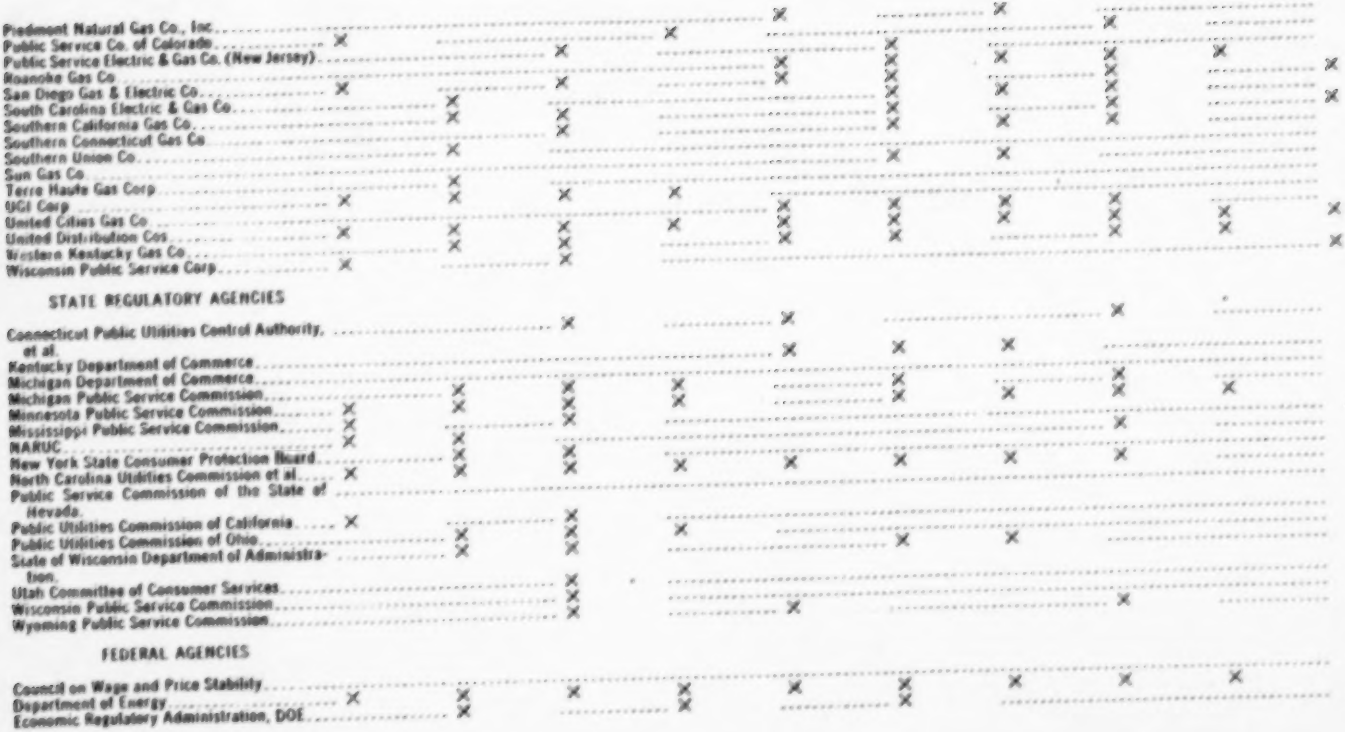
| | Timing | Scope | No. 2 No. 6 | Market order. | Price shell'g | Adverse economic impact | Incrs. oil use | Load loss | Conservation | Keep estimation procedure |
|---|---|---|---|---|---|---|---|---|---|---|
| **INDUSTRIAL END-USERS** | | | | | | | | | | |
| Western Lime & Cement Co. | | X | | X | | X | | | | |
| Western States Clay Products Association | X | | | | | X | | | | |
| Whirlpool Corp. | | X | X | X | X | X | | | | |
| White Pine Copper Division of Copper Range Co. | | X | X | | | X | | | | X |
| Wilson Concrete | | | | | | X | | | | |
| Wine Institute | | | | | | | | | | |
| Wonderling, Craig M. | | X | | | | X | | | | |
| Worthington Industries | | | | | | X | | | | |
| Young Galvanizing, Inc. | | | | | X | X | X | | | |
| **CHAMBERS OF COMMERCE** | | | | | | | | | | |
| California Chamber of Commerce | X | X | X | | X | X | | | | |
| Cleveland Bradley Chamber of Commerce | | X | | | X | X | | X | | |
| Council Bluffs Chamber of Commerce | | X | | | X | | | | | |
| Duluth Chamber of Commerce | | X | | | | X | X | X | | |
| Illinois State Chamber of Commerce | | X | X | | | X | X | | X | |
| Kentucky State Chamber of Commerce | | X | | | X | X | | | | |
| Lincoln Chamber of Commerce | | | | | | X | | | | |
| Louisville Chamber of Commerce | | X | | | X | X | X | | | |
| Springfield Chamber of Commerce | | X | | | | X | | | | |
| St. Paul Area Chamber of Commerce | | | X | | X | X | | X | | |
| U.S. Chamber of Commerce | | | | | | | | | | |
| **CONSUMER GROUPS** | | | | | | | | | | |
| Council of Consumer Energy | | | | | | X | | | | |
| Fernandez, N. R. | | X | | | | X | | | | |
| Halt Rip-off Committee | | | | | | X | | | | |
| Hasselbach, John | | X | | | | X | | | | |
| Herman Energy Services | | X | | | | | | | | |
| National Consumer Law Center, Inc. | | X | X | | X | | | X | | |
| Shirley, Donald T. | | | | | | X | | | | |


NGL EXTRACTION PLANTS
Chemplex Co
Cities Service Co
Gas Processors Association
Gulf Oil Corp
Mapco, Inc
Mitchell Energy Corp
National Distillers and Chemical Corp
National Helium Corp
National LP Gas Association
Northern Gas Products Co
Straddle Plant Group
Sun Oil
Union Oil Co. of California
PIPELINE COMPANIES
Cities Service Gas Co
Colorado Interstate Gas Co
Columbia Gas Transmission Corp
Commonwealth Gas Pipeline Corp
Consolidated Gas Supply Corp
East Tennessee Natural Gas Co
Florida Gas Transmission Co
Interstate Natural Gas Association of America
Mississippi River Transmission Corp
Natural Gas Pipeline Co. of America
Northern Natural Gas Co
Northwest Pipeline Corp
Southern Natural Gas Co
Southwest Gas Corp
Texas Gas Transmission Corp
United Gas Pipeline Co
PUBLIC UTILITIES—CITIES
Alabama Gas Corp
American Gas Association
Boonville Natural Gas Co
Boston Gas Co., Providence Gas Co., and Brooklyn Union Gas Co.
Brownsville Utility Dept
Carrollton Utilities
Central Florida Gas Corp
Columbia Gas Distribution Cos
Connecticut Natural Gas Co
Covington, Tenn
Crockette Public Utility District

APPENDIX A

SUMMARY OF COMMENTS ON PHASE II RULEMAKING

| | Timing | Scope | No. 2 No. 6 | Market order. | Price shelt'g | Adverse economic impact | Incrs. oil use | Load loss | Conservation | Keep estimation procedure |
|---|---|---|---|---|---|---|---|---|---|---|
| PUBLIC UTILITIES—CITIES—Continued | | | | | | | | | | |
| Duke Power Co | | | | | | | | | | |
| Elizabethtown, Ky | | X | | | | | | | | |
| Elizabethtown Natural Gas | | | | | | | | | | |
| Florida Public Utilities Co | | X | X | | | X | | | | |
| Gas Light Co. of Columbus, Ga | | | | | | X | | | | |
| Gas Utilities Co | | X | | | | | | X | | |
| Gibson County Utility District | | X | X | | | | | X | | |
| Great River Gas Co | | X | | | | | | | | |
| Grey, Robert P., consultant | | X | | | | | | | | |
| Hamilton, Ohio | | X | | | | | | X | | |
| Humboldt Utilities | | X | | | | | | | | |
| Illinois Gas Co | | X | | | | | X | X | | X |
| Indiana Gas Co | | X | X | | X | X | X | X | | |
| Indiantown Gas Co | | X | | | | X | | | | |
| Iowa-Illinois Gas & Electric Co | X | X | | | X | X | X | | | |
| Iowa Public Service Co | | X | | | X | X | X | X | | |
| Jackson Utility Division | | X | | | X | X | | X | | |
| Kyle Associates, Inc | | X | X | | | | X | | | X |
| City of Louisville | | X | X | | | X | X | X | X | |
| Louisville Gas & Electric | X | X | | | | | | | | |
| Louisiana Gas Service | | X | X | | X | | X | | | |
| Memphis Light, Gas & Water Division | | | | | | | | | | |
| Midwest Natural Gas Corp | | X | | | | | | | | |
| Missouri Power & Light Co. and Missouri Edison Co. | | | | | | X | X | X | | |
| Mississippi Valley Gas Co | X | X | | | | | | | | |
| Montana-Dakota Utilities Co | | X | X | X | X | | | | | |
| Mountain Fuel Supply Co | | X | X | X | | X | | X | | X |
| Municipalities for Small Industrial Consumers | | | | | | | | | | |
| Murray Natural Gas System | | X | | | | | | X | | |
| National Gas & Oil Corp | X | X | X | | | X | | | X | |
| New Jersey Natural Gas Co | X | X | X | X | | | X | X | | |
| Northern Illinois Gas Co | X | X | X | | | | | X | | X |
| Northern Indiana Public Service Co | | X | X | X | | X | X | X | | X |
| Northern States Power Co | | X | X | X | | X | X | | | X |
| Pacific Gas & Electric Co | | X | X | X | | | | X | | X |
| Peoples Gas System | | X | X | | X | X | X | X | | |


Piedmont Natural Gas Co., Inc.
Public Service Co. of Colorado
Public Service Electric & Gas Co. (New Jersey)
Roanoke Gas Co.
San Diego Gas & Electric Co.
South Carolina Electric & Gas Co.
Southern California Gas Co.
Southern Connecticut Gas Co.
Southern Union Co.
Sun Gas Co.
Terre Haute Gas Corp.
UGI Corp.
United Cities Gas Co.
United Distribution Cos.
Western Kentucky Gas Co.
Wisconsin Public Service Corp.
STATE REGULATORY AGENCIES
Connecticut Public Utilities Control Authority, et al.
Kentucky Department of Commerce
Michigan Department of Commerce
Michigan Public Service Commission
Minnesota Public Service Commission
Mississippi Public Service Commission
NARUC
New York State Consumer Protection Board
North Carolina Utilities Commission et al.
Public Service Commission of the State of Nevada
Public Utilities Commission of California
Public Utilities Commission of Ohio
State of Wisconsin Department of Administration
Utah Committee of Consumer Services
Wisconsin Public Service Commission
Wyoming Public Service Commission
FEDERAL AGENCIES
Council on Wage and Price Stability
Department of Energy
Economic Regulatory Administration, DOE

## APPENDIX A

### SUMMARY OF COMMENTS ON PHASE II RULEMAKING

| | Timing | Scope | No. 2 No. 6 | Market order. | Price shall'g | Adverse economic impact | Incrs. oil use | Load loss | Conservation | Keep estimation procedure |
|---|---|---|---|---|---|---|---|---|---|---|
| **U.S. CONGRESSMEN** | | | | | | | | | | |
| Anderson, John | X | | | | X | X | | X | | |
| Archer, Bill | X | X | X | | | X | | | | |
| Ashley, Ludlow | | | | | | X | X | X | | |
| Aspen, Les | X | X | X | | X | X | | | | |
| Bailey, Don | | X | | | | | | X | | |
| Baldus, Alvin | | | | | | X | | X | | |
| Beard, Robin | | X | X | | X | X | | X | | |
| Benjamin, Adam | X | X | X | | X | X | | X | | |
| Bowen, David R | X | X | X | | X | X | | X | | |
| Broyhill, James T | X | X | X | | X | X | | X | | |
| Buchanan, John | X | X | X | | X | X | X | | | |
| Butler, M. Caldwell | | | | | | X | | X | | |
| Chiles, Lawton | X | X | X | | X | X | | X | | |
| Collins, James M | X | X | X | | X | X | | X | | |
| Corcoran, Tom | X | X | X | | X | X | | X | | |
| Dannemeyer, William E | X | X | X | | X | X | | | | |
| Derrick, Butler | X | X | X | | | X | | | | |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| Dickinson, William L | X | X | X | | X | X | | X | | |
| Dingell, John | X | X | X | X | | | | | | |
| Eckhardt, Bob | X | X | X | X | | | | | | |
| Erlenborn, John N | X | X | X | X | X | X | | X | | |
| Fountain, L. H | X | X | X | X | X | X | | X | | |
| Gibbons, Sam | X | X | X | X | X | X | | X | | |
| Gramm, Phil | X | X | X | X | X | X | | X | | |
| Gudger, Lamar | X | X | X | X | X | X | | X | | |
| Guyer, Tennyson | X | X | X | X | X | X | | X | | |
| Hinson, Jon | X | X | X | X | X | X | | X | | |
| Hyde, Henry J | X | X | X | X | X | X | | X | | |
| Ireland, Andy | X | X | X | X | X | X | | X | | |
| Kemp, Jack F | X | X | X | X | X | X | | X | | |
| Kindness, Thomas N | X | X | X | X | X | X | | X | | |
| Livingston, Bob | X | X | X | X | X | X | | X | | |
| Long, Gillis W | X | X | X | X | X | X | | X | | |
| Lott, Trent | X | X | X | X | X | X | | X | | |
| Luken, Thomas A | | X | | | | | | | | |
| O'Brien, George M | X | X | X | X | X | X | X | X | | |
| Preyer, Richardson | X | X | X | X | X | X | X | X | | |
| Quillen, James H | X | X | X | X | X | X | X | X | | |
| Stockman, Dave | X | X | X | X | X | X | X | X | | |
| Stone, Richard | | | | | | | X | X | X | |
| Treen, David | | X | | X | | X | X | X | | |
| Walker, Robert S | X | X | X | X | X | X | X | | | |
| Weaver, Jim | | | X | X | | | | X | | |
| Whitehurst, G. William | X | X | X | X | X | X | | | | |
| Wilson, Charles | X | X | X | X | X | X | X | | | |

## Appendix B

### Estimate of Volumes Subject to the Phase II Rule

In order to estimate the direct industrial cost impact of the final rule, data from the EIA–50 reporting form have been analyzed. Four industries were considered in detail; chemicals; petroleum; stone, clay and glass; and primary metals (SIC codes 28, 29, 32, and 33 respectively). In the Environmental Assessment accompanying this rule it was determined that these four industries account for nearly 80 percent of total non-boiler gas use in manufacturing.[1] Table A–1 reproduces the relevant table from the Environmental Assessment.

TABLE A-1.—1976 MANUFACTURING SECTOR NATURAL GAS CONSUMPTION BY INDUSTRY AND END USE*

| SIC Code—Industry | Natural gas use ($10^{12}$ Btu) | | | | | Percent of nonboiler gas use** |
|---|---|---|---|---|---|---|
| | Boiler† | Process heat | Feedstock | Other‡ | Total | |
| 20—Food | 358 | 119 | ---------- | 1 | 478 | 3 |
| 22—Textiles | 44 | 40 | ---------- | ---------- | 84 | 1 |
| 26—Paper | 293 | 72 | ---------- | 1 | 366 | 2 |
| 28—Chemicals | 1,062 | 450 | 474 | 198 | 2,184 | 25 |
| 29—Petroleum | 251 | 713 | ---------- | 16 | ††980 | 19 |
| 32—Stone, clay and glass | 30 | 593 | ---------- | ---------- | 623 | 16 |
| 33—Primary metals | 348 | 661 | ---------- | 40 | ††1,049 | 18 |
| Other manufacturing | 270 | 588 | ---------- | 6 | 864 | 16 |
| All manufacturing | 2,656 | 3,236 | 474 | 262 | 6,628 | 100 |
| Functional use as percent of total manufacturing | 40 | 49 | 7 | 4 | ---------- | 100 |

*Included intrastate consumption.
†Boiler use includes space heating, electric generation, and process steam.
‡Other includes machine drive, lighting, space cooling, and miscellaneous uses not explicitly specified in this table.
**Nonboiler includes process heat and feedstocks.
††Only purchased natural gas is shown for the petroleum and steel industries. Refinery gas accounts for roughly 1 quad of gaseous fuel use in SIC 29, and coke oven gas contributes approximately 0.3 quads of gaseous fuel use in steel.

Source: EEA, "Energy Consumption Data Base, 1976" (interim results), December 1979.

Because the EIA–50 data does not distinguish between boiler and non-boiler use of gas, an estimate of non-boiler use had to be developed independently. Again relying upon information developed in the Environmental Assessment, the fraction of gas used for purposes other than boiler fuel in the four industries studied was estimated on a national basis as follows:

| *SIC code and industry description* | *Percent used in nonboiler applications* |
|---|---|
| 28 Chemicals | 51.37 |
| 29 Petroleum | 74.39 |
| 32 Stone, clay, glass | 95.18 |
| 33 Primary metals | 66.83 |

These percentages were used to adjust the EIA–50 data for each gas consuming facility, in order to derive an approximation of the volumes

[1] "Environmental Assessment of Incremental Pricing—Phase II," Docket No. RM80-10, Federal Energy Regulatory Commission, Office of Pipeline and Producer Regulation, April 1980, page 12.

subject to Phase II. The most recent annual set of data from EIA–50 was used, running from April of 1978 to March of 1979. The data from Texas, Oklahoma, New Mexico, Alaska, and Hawaii were excluded in order to reflect only interstate gas consumption.

After adjusting to reflect non-boiler use, the analysis proceeded by subtracting from the monthly gas use reported by each facility a quantity equal to 300 Mcf multiplied by the number of days in the subject month. This yields an estimate of the small use exemption. If, in any month, less gas was consumed than the allowable exempt volume, incrementally priced consumption for that month was set equal to zero. For each facility, a ratio was developed comparing the total annual volume subject to Phase II with the total annual estimated non-boiler use. This "coverage ratio" reflects the proportion of a facility's annual consumption that is subject to Phase II of incremental pricing. A value of zero indicates that no gas is surcharged. A value close to unity (1.0) indicates that almost all gas is subject to incremental pricing. Because the first 300 Mcf per day of gas is exempt for all facilities, the ratio must always be less than unity.

The coverage ratio is then used to derive the effective average surcharge applicable to non-boiler Phase II uses. For example, if the ratio for a given facility is 0.5, half the gas consumed on an annual basis is incrementally priced. So if the surcharge is estimated to be 60 cents per Mcf and half of the facility's consumption will be surcharged, the average price increase resulting from Phase II would be 30 cents per Mcf. If the coverage ratio of another facility is 0.4, the average price increase works out to 24 cents per Mcf. Obviously, if the coverage ratio is zero, all gas is exempted, and the average price increase is also zero.

In this analysis of economic impact, industry coverages were computed and grouped by deciles. On a state-by-state basis, and for each of the four SIC codes analyzed, the facilities are categorized into those having coverage ratios greater than or equal to zero but less than 0.1, greater than or equal to 0.1 but less than 0.2, and so forth. Data is also summed across all states to provide a national picture of the extent of incremental pricing under Phase II. Along with the coverage ratio data, volumes subject to Phase II and estimated non-boiler volumes are listed by SIC code, by state and nationally. From these basic data, estimates of the aggregate direct cost impact of Phase II on industrial users may be derived by multiplying non-exempt volumes by the applicable surcharge.

## RESULTS

The national summary indicates the following potential direct cost impact of Phase II, based on volumes as reflected in the most current 12 months of EIA–50 data: [2]

| | Estimated nonboiler use (Mcf) | Estimated volume subject to phase II (Mcf) | Percent of nonboiler use subject to phase II |
|---|---|---|---|
| SIC Code: | | | |
| 28 | 246, 309, 699 | 198, 020, 672 | 80.40 |
| 29 | 176, 199, 695 | 155, 511, 318 | 88.26 |
| 32 | 380, 351, 341 | 297, 001, 388 | 78.08 |
| 33 | 374, 157, 181 | 314, 283, 660 | 81.97 |
| Total | 1, 177, 027, 916 | 964, 826, 038 | 81.97 |

[2] These figures do not reflect any other exemptions such as agriculture or cogeneration.

The aggregate impact of Phase II is generally consistent across the industries studied. The higher percentage of gas subject to incremental pricing in the petroleum industry (SIC 29) probably results from the large facility sizes typical in the industry. On the other hand, the smaller facility sizes typical in the stone, clay and glass industries (SIC 32) give rise to an aggregate exposure to incremental pricing somewhat lower than the four industry average.

Examination of the coverage ratio data provides further insight on expected impacts (see Table 1). In the Chemical industry (SIC 28), 382 facilities out of a total of 706 fell into the lowest decile. These 382 facilities would be subject to incremental pricing for less than 10 percent of their gas consumption. The average impact on each such facility would range from zero to six cents per Mcf. Thus, over half of the facilities in the chemical industry would experience little or no direct cost impact from Phase II. The spread among higher deciles is relatively uniform. The highest decile contains 55 facilities, or about 8 percent of the total, but consumes approximately 65 percent of total non-boiler use in the chemical industry. These larger facilities would receive an average price increase ranging between 54 cents and 60 cents per Mcf.

The petroleum industry has a lower percentage of small facilities; only 59 out of 235, or 25 percent, fall into the lowest decile. The remaining facilities are spread rather uniformly among the higher deciles.

TABLE 1.—COVERAGE RATIO DATA; BY SELECTED INDUSTRY GROUPS

| | Decile No. | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | Total |
| Percent of gas subject to incremental pricing: | | | | | | | | | | | |
| At least | 0 | 10 | 20 | 30 | 40 | 50 | 60 | 70 | 80 | 90 | ..... |
| But less than | 10 | 20 | 30 | 40 | 50 | 60 | 70 | 80 | 90 | 100 | ..... |
| SIC 28—Chemicals: | | | | | | | | | | | |
| Number of facilities | 382 | 27 | 26 | 36 | 35 | 30 | 39 | 35 | 41 | 55 | 706 |
| Percent of total | (54.1) | (3.8) | (3.7) | (5.1) | (5.0) | (4.2) | (5.5) | (5.0) | (5.8) | (7.8) | (100) |
| SIC 29—Petroleum: | | | | | | | | | | | |
| Number of facilities | 59 | 17 | 21 | 15 | 12 | 14 | 18 | 22 | 20 | 37 | 235 |
| Percent of total | (25.1) | (7.2) | (8.9) | (6.4) | (5.1) | (6.0) | (7.7) | (9.4) | (8.5) | (15.7) | (100) |
| SIC 32—Stone, clay and glass: | | | | | | | | | | | |
| Number of facilities | 131 | 56 | 60 | 59 | 58 | 92 | 85 | 115 | 132 | 83 | 871 |
| Percent of total | (15.0) | (6.4) | (6.9) | (6.8) | (6.7) | (10.6) | (9.8) | (13.2) | (15.2) | (9.5) | (100) |
| SIC 33—Primary metals: | | | | | | | | | | | |
| Number of facilities | 297 | 47 | 36 | 42 | 34 | 38 | 32 | 43 | 51 | 85 | 705 |
| Percent of total | (42.1) | (6.7) | (5.1) | (6.0) | (4.8) | (5.4) | (4.5) | (6.1) | (7.2) | (12.1) | (100) |
| Total | 869 | 147 | 143 | 152 | 139 | 174 | 174 | 215 | 244 | 260 | 2,517 |
| Percent of total | (34.5) | (5.8) | (5.7) | (6.0) | (5.5) | (6.9) | (6.9) | (8.5) | (9.7) | (10.3) | (100) |

The stone, clay, and glass industries display a different, more bell-shaped, size distribution. Only about 15 percent fall into the lowest decile. The highest decile contains less than 10 percent of the total. A large number of facilities fall in the seventh and eighth deciles; about 28 percent of all facilities are subject to average surcharges of between 42 cents and 54 cents per Mcf.

The data on the primary metals industry reveals a more uniform pattern. The lowest decile contains 42 percent of the total. The highest contains 12 percent.

In an effort to more fully assess the impact of the small use exemption, EIA–50 data was also used to estimate average daily gas consumption on a year-round basis. Facilities were then grouped into categories consuming less than 100 Mcf per day, between 100 and 200, and so forth (see Table 2). The grouping is of course only approximate, since a more accurate computation would require detailed seasonal use profiles, which are not available.

TABLE 2.—AVERAGE GAS CONSUMPTION; BY SELECTED INDUSTRY GROUPS

| | Category No. | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | Total |
| Average daily gas use (Mcf): | | | | | | | | | | | |
| At least | 0 | 100 | 200 | 300 | 600 | 1,200 | 2,400 | 3,600 | 7,200 | 10,000+ | ..... |
| But less than | 100 | 200 | 300 | 600 | 1,200 | 2,400 | 2,600 | 7,200 | 10,000 | ..... | ..... |
| SIC 28-Chemicals: | | | | | | | | | | | |
| Number of facilities | 439 | 50 | 28 | 54 | 45 | 35 | 17 | 19 | 7 | 12 | 706 |
| Percent of total | (62.2) | (7.1) | (4.0) | (7.6) | (6.4) | (5.0) | (2.4) | (2.7) | (1.0) | (1.7) | (100) |
| SIC 29—Petroleum: | | | | | | | | | | | |
| Number of facilities | 93 | 25 | 9 | 26 | 28 | 18 | 9 | 14 | 6 | 7 | 235 |
| Percent of total | (39.6) | (10.6) | (3.8) | (11.1) | (11.9) | (7.7) | (3.8) | (6.0) | (2.6) | (3.0) | (100) |
| SIC 32—Stone, clay and glass: | | | | | | | | | | | |
| Number of facilities | 232 | 97 | 51 | 141 | 141 | 118 | 44 | 39 | 6 | 2 | 871 |
| Percent of total | (26.6) | (11.1) | (5.9) | (16.2) | (16.2) | (13.5) | (5.1) | (5.5) | (0.7) | (0.2) | (100) |
| SIC 33—Primary metals: | | | | | | | | | | | |
| Number of facilities | 370 | 56 | 33 | 68 | 46 | 42 | 26 | 29 | 16 | 19 | 705 |
| Percent of total | (52.5) | (7.9) | (4.7) | (9.6) | (6.5) | (6.0) | (3.7) | (4.1) | (2.3) | (2.7) | (100) |
| Total | 1,134 | 228 | 121 | 289 | 260 | 213 | 96 | 101 | 35 | 40 | 2,517 |
| Percent of total | (45.1) | (9.1) | (4.8) | (11.5) | (10.3) | (8.5) | (3.8) | (4.0) | (1.4) | (1.6) | (100) |

This simplified estimate of average daily consumption reveals an apparently large number of relatively small facilities—particularly in the chemical industry. Over 60 percent of the facilities in the chemical industry use less than 100 Mcf per day average use on a year-round basis. Another seven percent used between 100 Mcf per day and 200 Mcf per day. Ignoring the effect of seasonal variations, these small facilities would not be exposed to incremental pricing under either the small use exemption or through operation of an exemption similar to that applicable to small boiler use. Considering all of the four major SIC codes, fully 1,483 facilities, or 59 percent of the 2,517 studied, used less than an average of 300 Mcf per day and would be exempt from incremental pricing.

A review of the coverage ratio data gives rise to a very different interpretation, however. Although 1,483 facilities fell into the lowest three average use categories (less than 300 Mcf per day), only 869 facilities fell into the lowest coverage ratio (less than 0.1). Clearly, a facility using no more than 300 Mcf on any day would have no exposure to incremental pricing and thus would have a coverage ratio of zero. The fact that many facilities using less than 300 Mcf per day on an annual average basis have coverage ratios in excess of 0.1 indicates the considerable degree of seasonality in gas use patterns.

If a small use exemption similar to that applicable to boiler use were adopted in lieu of the "first 300 Mcf per day" rule, many facilities whose annual average use is below 300 Mcf per day would be caught by the program due to high seasonal use. It is likely that many of these small facilities would switch to alternative fuels when their

average use in any month threatened to trigger the general application of incremental pricing. For non-boiler use, the alternative fuels most likely to be used in many industries are distillate oil and propane. In some situations, an alternative fuel may not be available or practicable, and temporary shutdown may represent a less expensive alternative than subjecting all gas use to incremental pricing. Temporary shutdowns and the use of scarce and expensive alternative fuels are both economic "waste" which will be avoided by exempting the first 300 Mcf per day of average use for all users subject to Phase II.

About one quarter of all facilities studied (614 facilities) have annual average use below 300 Mcf per day, but would be subject to incremental pricing under the originally-proposed "all or nothing" small user rule due to seasonality considerations. Significantly, at least 90 percent of the gas used by these facilities will be exempt under the small use exemption adopted by the Commission. Another 260 facilities (10.3 percent of the total studied) had annual average use of between 300 and 600 Mcf per day. Many such facilities would also find supplemental use of expensive alternative fuels economically advantageous under an "all or nothing" rule, but will not be penalized for using more attractive natural gas under the treatment adopted.

Having isolated the general effects of the small user exemption, the other potentially significant influence on Phase II coverage is the statutory exemption for agricultural uses. The analysis of the small use exemption and the agricultural exemption may then be incorporated into a broader study of the entire Phase II program. An estimate of the total quantity of gas subject to surcharge, total surcharge dollars, and the resulting rate decrease for exempt users may be developed. For the four SIC codes consider above, the magnitude of the agricultural exemption must be estimated.

The petroleum and primary metals industries are generally unaffected by the agricultural exemption, and all non-boiler gas in excess of the small use exemption can be assumed subject to Phase II. About 40 percent of the non-boiler gas consumed in the chemical industry is estimated to be eligible for exemption as agricultural. This exempt gas includes nearly all of the feedstock consumption in the chemical industry since agricultural ammonia is the principal product. In the stone, clay, and glass industries (SIC–32), 15.5 percent of all gas consumption is in the production of sanitary food containers—glass jars and bottles. Since 95 percent of gas use in SIC 32 is non-boiler, the 15.5 percent agricultural exemption can be applied to non-boiler use directly with little loss of accuracy. After all appropriate adjustments for boiler use, small use exemptions, and agricultural exemptions, 839,578,954 Mcf, were estimated to be subject to Phase II in SIC's 28, 29, 32 and 33, on the basis of the most recent EIA–50 data.

In manufacturing industries other than the four considered above, a total of 573,320,854 Mcf was reported consumed. Of this quantity, 68.75 percent, or 394,158,087 Mcf is estimated to be non-boiler use. Agricultural use in SIC's 2141 (tobacco), 3411 and 3497 (fabricated metal food containers) reduce the total somewhat more. Finally, the small use exemption profile developed for the four industry groups is estimated to be equally applicable t other non-boiler uses, so that 80 percent of the remaining gas will be subject to surcharges. The total quantity estimated to be subject to Phase II in other manufacturing industries is 308,314,412 Mcf.

One more step remains before the total impact of Phase II can be assessed. Some gas consumption in SIC codes 22 (textiles) and 26 (pulp and paper) will be subject to Phase II. Most, but not all, gas used in these industries will qualify for the agricultural exemption. Estimates of the fraction of gas use which is not so exempt were derived from data developed for the Environmental Assessment. The effect of the small use exemption was assumed to be 20 percent, consistent with other manufacturing industries. The baseline consumption data was taken from the most recent EIA-50 reports, adjusted to remove intrastate gas use. In summary, 15,271,982 Mcf of gas subject to Phase II was found in SIC codes 22 and 26. All gas consumed in SIC code 20 (food) was considered to be exempt.

No attempt has been made to explicitly estimate the volume of gas that may be exempted from incremental pricing by reason of cogeneration. This is because the cogeneration exemption is expected to have a negligible effect on the scope of the Phase II program. The great majority of both existing and proposed cogeneration facilities are steam turbine topping-cycles. Such steam-raising facilities would be subject to incremental pricing under Phase I, if not exempted. Only bottoming-cycle cogeneration facilities and unusual topping-cycle facilities in which high temperature combustion turbine or engine exhaust is used directly for process heat would be potentially subject to Phase II. Widespread application of such facilities is not expected in the near future.

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**UNITED STATES OF AMERICA**
**FEDERAL ENERGY REGULATORY COMMISSION**

Before Commissioners: Charles B. Curtis, Chairman; Matthew Holden, Jr., and George R. Hall.

| | | |
|---|---|---|
| Rule Under Section 202 of the Natural Gas Policy Act of 1978 | ) ) ) | Docket No. RM80-10 |

## ORDER DENYING REHEARING AND REVOKING AMENDMENTS MADE BY ORDER NO. 80

(Issued August 1, 1980)

In Order No. 80, issued on May 6, 1980, the Commission promulgated a rule in this docket and submitted it to Congress as required by section 202(c) of the Natural Gas Policy Act of 1978 (NGPA). That rule would have expanded the scope of incremental pricing from its present coverage of industrial boiler fuel facilities to include "any industrial facility which is within a category defined by the Commission." The rule proposed to Congress would have extended the incremental pricing program "to all industrial users except those specifically exempted." (Order No. 80 at 6)

In Order No. 80, the Commission did not "second-guess the social and economic judgments that Congress made in enacting Title II." (Order No. 80 at 5) On the contrary, it saw its role as a more limited one, *i.e.*, it brought "its technical expertise to bear on the design of a workable Phase II rule that [could] best advance the purposes set by Congress." (*Id.*) The Commission believed, however, that

in the last analysis the Congress had reserved to itself the question "whether this Phase II submittal meets adequately the social and economic goals of the incremental pricing program or, indeed, whether those goals are still appropriate." (*Id.*)

On May 6, 1980, the Commission transmitted the rule to Congress. On May 20, 1980, the House of Representatives passed a Resolution of Disapproval (H. Rep. 655),[1] which under the language of section 202 of the NGPA makes the rule ineffective.

On June 5, 1980, the Consumer Energy Council of America, *et al.* ("CECA"), filed a timely petition for rehearing of Order No. 80. In that petition, CECA raises a single issue – whether the legislative veto provision of section 202 is constitutional.[2] On July 8, 1980, the Commission granted rehearing solely for the purpose of further consideration.

We recognize that the constitutional issue concerning the validity of the legislative veto mechanism is one which has not been decided by the Supreme Court of the United States, and is one on which there is great diversity of view both within the Federal government and among legal

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[1]This is the only instance where Congress has exercised its veto in relation to the incremental pricing program.

[2]CECA raises this issue by requesting the Commission to strike the following language from the Order:

> ". . . if neither House of Congress passes a Resolution of Disapproval of the regulations transmitted to them in this Order within 30 days of Congressional review, as determined in accordance with section 507(b) of the NGPA. . . ."

Petitioners apparently believe that the elimination of this language could make the rule effective in accordance with its remaining terms.

scholars. Nevertheless, it was, at the time Order 80 was promulgated and today remains, our view that sound administrative practice requires the presumption of constitutional validity of the statutes entrusted to this Commission for implementation.[3]

If section 202(c) of the NGPA containing the Congressional review and legislative veto mechanism is eventually held to be invalid, an argument can be made that Order No. 80 would take effect at the expiration of 90 days after the 30-day Congressional review period. This is CECA's position. In view of this potential (a matter squarely presented to us in this application for rehearing), the Commission has examined the underlying premise of its decision to prescribe Order No. 80 in its present form. As we noted in Order No. 80, many commenters suggested that no section 202 rule, or the narrowest possible section 202 rule, be prescribed. We refused to entertain these arguments, stating:

> The Commission believes that it was neither requested nor authorized to second-guess the social and economic judgments that the Congress made in enacting Title II. The role of the Commission under Section 202 is more limited. Instead, the Commission is instructed to bring its technical expertise to bear on the decision of a workable Phase II rule that can best advance the purposes set by the Congress. It is up to the Congress to decide whether this Phase II submittal meets ade-

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[3]See *Califano v. Sanders*, 430 U.S. 99, 109 (1976); *Ostereich v. Selective Board*, 393 U.S. 233, 242 (1968) (Justice Harlan concurring in the result); *Buckeye Industries, Inc. v. Secretary of Labor*, 587 F.2d 231 (5th Cir. 1979); and *Speigel, Inc. v. Federal Trade Commission*, 540 F.2d 287 (7th Cir. 1976).

> quately the social and economic goals of the incremental pricing program or indeed, whether those goals are still appropriate. (Order No. 80, p. 5)

Clearly, if section 202(c)'s Congressional review provisions are constitutionally invalid, then our premise for refusing to consider these arguments, namely that it "is up to Congress to decide whether this Phase II submittal meets adequately the social and economic goals of the incremental pricing program", is equally invalid, and cannot be the basis for such refusal. If the Commission refused to consider material arguments made in the course of the rulemaking because of this faulty premise, then Order No. 80 cannot be the product of reasoned decision-making and the Commission is neither authorized nor required to place it in effect. Thus this question seems largely academic at this point, and Order No. 80 cannot take effect under its terms at the conclusion of the 90-day period which follows the conclusion of the 30-day Congressional review period.

As previously pointed out, the Commission has not yet independently evaluated whether the Phase II rule meets the social and economic goals of the Title II incremental pricing program.

But we question whether the marketplace should be left exposed to the potential of significant disruption should the courts not share this view of the law. We think such an exposure to be most inadvisable. Hence, we propose to adopt an administrative course which should remove this jeopardy.

Moreover, if the Commission were to make that independent social and economic evaluation – and we stress that we have not made it previously and do not make it here today – we believe as an initial matter that we might

well have very serious reservations as to the wisdom of making the Phase II rule effective. As we pointed out in Order No. 80, there are serious questions of general social and economic policy that deserve to be addressed. For example, we noted in the order that the rule there prescribed did not appear to be capable of carrying out the market ordering function of incremental pricing.[4]

Moreover, we note that the rule in its present form[5] might be an imperfect instrument for sheltering high-priority users from the economic impacts of rapidly increasing natural gas prices. Perhaps a better mechanism can be devised but if so, we were not able to discover it in the strict statutory period for implementation of incremental pricing.

In order to fairly make a broader judgment on the social and economic desirability of the rule as a sheltering device, or as a market-ordering device, the Commission would also have to consider and weigh much more imponderable and possibly countervailing factors – for example, the possibility that these fairly minimal savings to millions of high-priority users will be more than offset, in a broad social and political sense, by the significant surcharges and the increased costs of required reporting and accounting measures that would be imposed on the natural gas users subject to the Phase II rule.

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[4]Order No. 80, pp. 57-66.

[5]As Order No. 80 pointed out, at p. 71, sheltered high-priority users would, on the average, probably be spared a total of about $.14 per Mcf of purchased gas. For the average household using natural gas for heating or cooking purposes, this translates into a savings of about $18 per year.

A related and equally difficult social policy judgment that should properly be made by the Commission – if the Congress cannot constitutionally make it by way of the section 202(c) legislative veto – is whether the projected savings for high-priority users in annual gas costs might not be largely offset, in a strictly monetary sense, by increased prices for consumer goods possibly caused by passed-on Phase II incremental pricing surcharges.

These imponderables, and the other major social and economic issues raised by Order No. 80, simply must be assessed, and a reasoned judgment reached upon them, before the rule takes effect. The House of Representatives made a judgment to reject this proposal after consideration of these and other social and economic issues. The Commission has not made and does not today attempt an independent evaluation of them.

Moreover, such an evaluation in the future would be aided by an opportunity to judge the implementation of the Phase I over the coming months and the accompanying opportunity to address and resolve any administrative problems that may be encountered.

This seems to us the wiser administrative course of action, one that would minimize the risk of economic dislocations to the industrial sector and avoid adding at this time further recessionary pressures on American industry. It is the administrative course which we would choose, if the choice were ours to make.

In order to assure that an opportunity to evaluate Phase I, and the impacts of Phase II as proposed in the event section 202(c) is held invalid, the Commission will exercise its authority under sections 201 and 202 to amend the rule under section 201 to revoke the amendments made by Order No. 80. Revocation will permit the Commission in

the future to carefully weigh these considerations and if appropriate prescribe a Phase II rule which it finds to be in the public interest.

The Commission's authority to amend is clear. Section 201 directs the Commission to prescribe an incremental pricing rule applicable to industrial boiler fuel facilities, and authorizes the Commission "from time to time" to amend the rule. Section 202 requires the Commission to amend the 201 rule to expand its applications to such other categories of industrial facilities as it may define. The amendment required by section 202 to the section 201 rule is part of the section 201 rule. Thus, the amendment may, by the terms of section 201, be amended "from time to time." By the terms of 202(a)(2), the amendment required by section 202 and all amendments "applicable to facilities to which the amendments required by this section applies (other than technical and clerical amendments)" are subject to the Congressional review procedure in section 202(c), if those procedures are constitutionally valid. However, the amendment made by this order will have legal effect only if section 202(c) is invalid. Moreover, if section 202(c) is invalid, then the Congressional review procedure it sets out is inoperative. The amendment shall, in this event, take effect immediately on issuance without submission to either House of Congress.[6]

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[6]It is similarly clear, if section 202(c) is invalid, that there is no requirement that Order No. 80 be made effective at any particular time or at all. Section 202(a)(1) requires the Commission, within 18 months after the enactment of the NGPA, to "prescribe" an amendment to the rule under section 201. However, under section 202(a)(2), the amendment prescribed "shall take effect only as provided in subsection (c) [of section 202]." If section 202(c) is invalid, the statutory mechanism for placing the rule in effect no longer exists, and the Commission is not required to place Order No. 80 in effect.

**The Commission orders:**

(A) The petition for rehearing is denied.

(B) The amendments made by Order No. 80 to the Commission's regulations are revoked, effective on issuance of this order.

By the Commission.
(SEAL)

/s/
Kenneth F. Plumb,
Secretary.

**UNITED STATES OF AMERICA**
**FEDERAL ENERGY REGULATORY COMMISSION**

Before Commissioners:
Charles B. Curtis, Chairman;
Georgiana Sheldon, Matthew Holden, Jr.,
George R. Hall and J. David Hughes.

| | | |
|---|---|---|
| Rule Under Section 202 of the Natural Gas Policy Act of 1978 | ) ) ) | Docket No. RM80-10 |

## ORDER DENYING REHEARING

(Issued October 2, 1980)

On August 1, 1980, the Commission denied a petition for rehearing of Order No. 80 which was filed by the Consumer Energy Council of America, *et al.* ("CECA"). In that order the Commission refused to assume that the legislative review mechanism of section 202(c) of the NGPA was invalid as CECA has urged and, thus, denied rehearing. The order necessarily recognized that the regulations promulgated by Order No. 80 were invalid in light of the specific terms of section 202(c).

In addition, the order went further and addressed CECA's assumption that the specific regulations promulgated in Order No. 80 should, or would, be effective in the event that the legislative review mechanism should prove constitutionally invalid.

The order indicated that the Commission had not independently evaluated a number of major social and economic issues, believing that this evaluation was the responsibility of the Congress. It concluded that the Order

No. 80 regulations should not become effective without the benefit of such a reasoned decisionmaking. It was for this reason that the Order No. 80 regulations were revoked.[1]

CECA now, by a petition for rehearing filed September 2, 1980, urges that the revocation of the regulations cannot be accomplished in this manner. While CECA concedes that the Commission has discretion over the form that the Phase II rules should take (Petition at 2), it claims that the decision has been exercised and is final because section 202 requires regulations by a date certain.

As its second argument, CECA claims that the attempted revocation is invalid for failure to comply with the notice and comment procedure of 5 U.S.C. § 553.

## DISCUSSION

We do not concede that section 202 required the implementation of Phase II regulations in the absence of the validity of section 202(c). We do agree, however, that at least "the Commission has . . . discretion . . . as to the form which such rules should take." (Petition at 2). We have done no more than exercise that discretion by indicating that the Order No. 80 regulations should not become effective without a Commission evaluation of the major social and economic issues raised therein.

As it stands now, Congress and not the Commission, has made an evaluation of the social and economic goals of incremental pricing under section 202(c). If it is ultimately determined that the Congressional review is in-

[1]As we indicated in the August 1, 1980 order, this revocation is only necesary if section 202(c) is invalid.

valid, the Commission must be the one to evaluate those goals, and the Order No. 80 regulations should not have any operative effect until the Commission makes its own independent evaluation. In the absence of such an evaluation, the Order No. 80 regulations cannot become effective. Simply stated, if Congressional review is impermissible, then reasoned decision-making on our part requires revocation of the Phase II regulations.

CECA's argument that we have no authority to revoke the Order No. 80 regulations overlooks our amendatory authority under sections 201 and 202. In section 201(a), Congress specifically authorized the Commission to "make effective (and . . . from time to time amend) a rule . . . ." In section 202(a)(2), Congress indicated that this power extends to "facilities to which the [section 202] amendment applies." The only constraint on this amendatory authority is section 202(c), which CECA argues is invalid. However, CECA cannot be allowed to have it both ways. It should not be heard to argue that the legislative veto in section 202(a) is invalid, yet at the same time, argue that section 202(c) somehow still restrains the Commission's authority to amend the Phase II rule. If section 202(c) is invalid, there is no statutory impediment to the Commission's exercising its amendatory authority. The August 1, 1980, order denying rehearing and revoking Order No. 80 exercised this authority.

Nor do we believe that the notice and comment procedures of 5 U.S.C. § 553 require another result. Because the Commission provided full notice and opportunity to comment prior to issuing Order No. 80, further comment is unnecessary. Notice of Proposed Rulemaking, 44 *Fed. Reg.* 67170 (November 23, 1979). However, to the extent that 5 U.S.C. § 553 would otherwise require it, we find here that for good cause, further notice and public pro-

cedure are "unnecessary" in accordance with 5 U.S.C. § 553(b).

Further, regardless of the application of those procedures to regulations which become operative, they cannot be required where regulations are revoked because they have not been fully considered.

**The Commission orders:**

The petition for rehearing is denied.

By the Commission.
(SEAL)

/s/

Lois D. Cashell
Acting Secretary

# UNITED STATES COURT OF APPEALS
# FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 80-2184** **September Term, 1981**

Consumer Energy Council of America,
Consumer Federation of America,
and Public Citizen,

Petitioners,

v.

Federal Energy Regulatory Commission,

Respondent,

Process Gas Consumers Group, et al.,
United Distribution Companies,
Interstate Natural Gas Association
of America,
American Gas Association,
Petrochemical Energy Group,

Intervenors.

No.80-2312

Consumer Energy Council of America,
Consumer Federation of America,
and Public Citizen,

Petitioners,

v,

Federal Energy Regulatory Commission,

Respondent,

United Distribution Companies,
Interstate Natural Gas Association
of America,
Process Gas Consumers Group, et al.,

United States
Court of Appeals
for the District of
Columbia Circuit

FILED JAN 29 1982

GEORGE A. FISHER
Clerk

American Gas Association,
Petrochemical Energy Group,
Intervenors.

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

Before: Bazelon, Senior Circuit Judge, Wilkey and Edwards, Circuit Judges

JUDGMENT

These causes came on to be heard on petitions for review of orders of the Federal Energy Regulatory Commission and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the one-house legislative veto provision in section 202(c) of the NGPA is unconstitutional. Accordingly, the orders of the Federal Energy Regulatory Commission under review herein are reversed and the cases are remanded to the Commission for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/_____
George A. Fisher
Clerk

Date: January 29, 1982
Opinion for the Court filed by Circuit Judge Wilkey.

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**
**No. 80-2184** **September Term, 1981**

Consumer Energy Council of America,
Consumer Federation of America,
and Public Citizen,
Petitioners,

v.

Federal Energy Regulatory Commission,
Respondent,

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Process Gas Consumers Group, et al.,
Intervenors.

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And consolidated case No. 80-2312

ARGUED
9-10-81

United States
Court of Appeals
for the District of
Columbia Circuit

FILED Mar 10 1982

GEORGE A. FISHER
Clerk

BEFORE: Bazelon, Senior Circuit Judge; Wilkey and Edwards, Circuit Judges

ORDER

On consideration of the petition for rehearing of intervenor American Gas Association, filed February 26, 1982, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam
FOR THE COURT:
George A. Fisher,
Clerk

BY: /s/
Robert A. Bonner
Chief Deputy Clerk

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 80-2184** **September Term, 1981**

Consumer Energy Council of America,
Consumer Federation of America,
and Public Citizen,
Petitioners,

v.

Federal Energy Regulatory Commission,
Respondent,

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Process Gas Consumers Group, et al.,
Intervenors.

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ARGUED
9-10-81

United States
Court of Appeals
for the District of
Columbia Circuit

FILED Mar 10 1982

GEORGE A. FISHER
Clerk

And consolidated case No. 80-2312

BEFORE: Robinson, Chief Judge, Bazelon, Senior Circuit Judge, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards, Ginsburg and Bork, Circuit Judges

ORDER

Intervenor American Gas Association's suggestion for rehearing has been circulated to the Court and no member of the Court or the panel has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam
FOR THE COURT:

George A. Fisher,
Clerk

BY: /s/
Robert A. Bonner
Chief Deputy Clerk

Circuit Judges Wright, Tamm, MacKinnon, Ginsburg and Bork did not participate in the foregoing order.

IN THE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

**Nos. 80-2184, 80-2312**

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CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,

*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,

*Respondent.*

and

THE PROCESS GAS CONSUMERS GROUP, *et al.*,

*Intervenors.*

---

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

---

Notice is hereby given that the Process Gas Consumers Group, the American Iron and Steel Institute, and the Georgia Industrial Gas Group, Intervenors herein, hereby appeal to the Supreme Court of the United States from the judgment entered by this court in the above-captioned proceeding on January 29, 1982, holding that the one-house legislative veto provision in Section 202(c) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3342(c), is unconstitutional, and ordering the Federal Energy Regulatory Commission to reinstate, subject to recon-

sideration, FERC Order No. 80, *reprinted in* 45 Fed. Reg. 31622 (May 13, 1980), promulgated pursuant to said Section 202.

This appeal is taken pursuant to 28 U.S.C. § 1252.*

/s/

Edward J. Grenier, Jr.
Glen S. Howard

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*Attorneys for*
*The Process Gas Consumers Group,*
*The American Iron and Steel Institute,*
*and*
*The Process Gas Consumers Group,*

*March 15, 1982*

*The above-named parties filed a Notice of Appeal herein on February 26, 1982, prior to receiving notice that a petition for rehearing had been timely filed that day by the American Gas Association. This Notice of Appeal is filed within 30 days of this Court's denial on March 10, 1982, of that petition for rehearing.

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

| | | |
|---|---|---|
| CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*, *Petitioners,* | ) | |
| v. | ) | |
| FEDERAL ENERGY REGULATORY COMMISSION, *Respondent,* | ) | Nos. 80-2184 80-2312 |
| and THE PROCESS GAS CONSUMERS GROUP, *et al.*, *Intervenors.* | ) | |

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that United Distribution Companies and Interstate Natural Gas Association of America hereby appeal to the Supreme Court of the United States from the judgment entered in this case on January 29, 1982, as to which a petition for rehearing was denied and a suggestion for rehearing en banc was rejected by orders dated March 10, 1982. The Court of Appeals held unconstitutional Section 202(c) of the Natural Gas Policy Act, 15 U.S.C. § 3342(c), and ordered that the Phase II incremental pricing rule, which had been issued pursuant to Section 202(a) of said Act, shall take effect, subject to possible action by the Federal Energy Regulatory Commission.

This appeal is taken pursuant to 28 U.S.C. § 1252.

/s/

John H. Cheatham, III
Vice-President,
General Counsel and Secretary
Interstate Natural Gas
Association of America
1660 L Street, N.W.
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/s/

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Attorneys of Record for
United Distribution Companies

March 17, 1982.

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**Nos. 80-2184, 80-2312**

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CONSUMER ENERGY COUNCIL OF AMERICA,
*ET AL.*,

*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,
*ET AL.*,

*Respondents.*

---

**ON PETITION FOR REVIEW OF ORDERS**
**OF THE FEDERAL ENERGY REGULATORY COMMISSION**

---

**NOTICE OF APPEAL**

---

Notice is hereby given, pursuant to 28 U.S.C. § 1252 and Rule 10 of the Rules of the Supreme Court, that the Petrochemical Energy Group, Intervenors in the above-captioned action, hereby appeals to the Supreme Court of the United States from the judgment of this Court entered on January 29, 1982, holding unconstitutional a portion of Section 202 of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3342(c), and ordering that the Phase II incremental pricing rule shall take effect subject to possible action by the Federal Energy Regulatory Commission.

The Petrochemical Energy Group previously filed a Notice of Appeal herein on February 26, 1982, priot to receipt of a petition for rehearing filed on the same day by the American Gas Association. Accordingly, this Notice of Appeal is filed within 30 days of the Court's denial on March 10, 1982, of that petition for rehearing.

Respectfully submitted,

/s/

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Attorneys for the
PETROCHEMICAL ENERGY
GROUP

March 25, 1982

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 80-2184**
**No. 80-2312**

CONSUMER ENERGY COUNCIL OF AMERICA, *ET AL.*,

*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION

*Respondent,*

Notice is hereby given that the Federal Energy Regulatory Commission hereby appeals to the Supreme Court of the United States from the judgment entered in this case on January 29, 1982, as to which a petition for rehearing and a suggestion for rehearing *en banc* were denied by orders dated March 10, 1982. The Court of Appeals held unconstitutional the one-house legislative veto provision in Section 202(c) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3342(c), and ordered the Phase II incremental pricing rule, *reprinted in* 45 Fed. Reg. 31622, promulgated pursuant to Section 202, to take effect, subject to reconsideration by the Federal Energy Regulatory Commission.

This appeal is taken pursuant to 28 U.S.C. 1252.

/s/

Jerome M. Feit
Solicitor
Federal Energy Regulatory Commission
825 North Capitol St., N.E.
Washington, D.C. 20426

March 25, 1982

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**Nos. 80-2184, 80-2312**

---

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,

*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,

*Respondent,*

*and*

THE PROCESS GAS CONSUMERS GROUP, *et al.*,

*Intervenors.*

---

**NOTICE OF APPEAL TO THE**
**SUPREME COURT OF THE UNITED STATES**

---

Notice is hereby given that the American Gas Association, an intervenor herein, appeals hereby to the Supreme Court of the United States from the judgment entered by this Court in these proceedings January 29, 1982, holding unconstitutional the one-house veto provision in Section 2020(c) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3342(c), and ordering the Federal Energy Regulatory Commission to reinstate, subject to reconsideration, FERC Order No. 80, *reprinted in* 45 Fed. Reg. 31622 (May 13, 1980), which order had been issued pursuant to Section 202(a) of the Act.

This appeal is taken pursuant to 28 U.S.C. § 1252.*

/s/

John A. Myler

American Gas Association
1515 Wilson Boulevard
Arlington, Virginia 22209
(703) 841-8460

Attorney for American Gas Association

March 26, 1982

*On February 26, 1982, the American Gas Association filed a timely petition for rehearing and suggestion of rehearing *en banc*. On March 10, 1982, orders denying the petition for rehearing and suggestion for rehearing *en banc* were entered by this Court.

96th Congress, 2nd Session, May 20, 1980

House Resolution 655

*Resolved,* That the House of Representatives does not approve the proposed rule under section 202 of the Natural Gas Policy Act of 1978 (relating to incremental pricing of natural gas) a copy of which was transmitted to the Congress on May 6, 1980.

CONSTITUTIONAL PROVISIONS INVOLVED:

1. Article I, Section 1, of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

2. Article I, Section 7, Clauses 2 and 3, of the United States Constitution provide:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House

respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

3. Article I, Section 8, of the United States Constitution provides in pertinent part:

The Congress shall have Power * * *

* * * * *

To regulate Commerce with foreign nations, and among the several states,* * *

* * * * *

– And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

4. Article II, Section 1, of the United States Constitution provides in pertinent part:

The executive Power shall be vested in a President of the United States of America.

5. Article II, Section 3, of the United States Constitution provides in pertinent part:

> * * * he shall take Care that the Laws be faithfully executed,* * *.

6. Article III, Section 1, of the United States Constitution provides in pertinent part:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Article III, Section 2, of the United States Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States,*** — to Controversies to which the United States shall be a Party; ***

STATUTORY PROVISIONS INVOLVED:

1. Section 201 of the Natural Gas Policy Act of 1978, as codified at 15 U.S.C. § 3341, provides:

**§ 3341. Industrial boiler fuel use**

**(a) In General**

Not later than 12 months after November 9, 1978, the Commission shall prescribe and make effective (and may from time to time amend) a rule designed to provide for the passthrough, in accordance with the provisions of this subchapter, of the costs of natural gas which are —

(1) described in section 3343 of this title; and

(2) incurred by any interstate pipeline.

**(b) Initial application**

The requirements of the rule under this section shall apply with respect to the boiler fuel use of natural gas by any industrial boiler fuel facility.

**(c) Definitions**

For purposes of this section –

**(1) Industrial boiler fuel facility**

The term "industrial boiler fuel facility" means any industrial facility, as defined by the Commission, which uses natural gas as a boiler fuel and which is not exempt under section 3346 of this title.

**(2) Boiler fuel use**

The term "boiler fuel use" means the use of any fuel for the generation of steam or electricity.

(Pub. L. 95-621, title II, § 201, Nov. 9, 1978, 92 Stat. 3371).

2. Section 202 of the Natural Gas Policy Act of 1978, as codified at 15 U.S.C. § 3342, provides:

**§ 3342. Amendment expanding application for other industrial uses**

**(a) In general**

**(1) Commission rule**

Not later than 18 months after November 9, 1978, the Commission shall, by rule, prescribe an amendment to the rule required under section 3341 of this title designed to provide for the passthrough, in accordance with the provisions of this subchapter, of the costs of natural gas which are –

(A) described in section 3343 of this title; and

(B) incurred by any interstate pipeline.

**(2) Effectiveness**

The amendment required by this section, and any amendment to the rule under section 3341 of this title which is applicable to facilities to which the amendment required by this section applies (other than a technical or clerical amendment), shall take effect only as provided under subsection (c) this section.

**(b) Expanded application**

The requirements of the rule under section 3341 of this title, as amended under subsection (a) of this section, shall apply with respect to the industrial use of natural gas (as defined by the Commission in such rule), including boiler fuel use of natural gas (as defined in section 3341(c)(2) of this title) by –

(1) any industrial boiler fuel facility (as defined in section 3341(c)(1) of this title); and

(2) any industrial facility which is within a category defined by the Commission in such amendment as subject thereunder to the requirements of such rule which is not exempt under section 3346 of this title.

**(c) Congressional review**

**(1) In general**

Any amendment, the effectiveness of which is subject to this subsection, shall take effect beginning with the first month which begins more than 30 days after the first 30 calendar days of continuous session of Congress (determined in accordance with section 3417(b) of this title[1] after a copy of such amendment has been submitted to each House of the Congress or on such later date, not more than 90 days thereafter, as may be provided in such

[1]So in original. Probably should be followed by a closing parenthesis.

amendment unless, during such 30 day period of continuous session of Congress, either House of the Congress adopts a resolution of disapproval described in section 3417(c)(3) of this title with respect to such amendment.

**(2) Authority in the event of Congressional disapproval**

**(A) Authority to resubmit**

If either House of the Congress adopts a resolution of disapproval with respect to the amendment required under subsection (a) of this section (or any amendment proposed and submitted under this subparagraph), the Commission may thereafter submit to each House of the Congress an amendment, satisfying the requirements of subsections (a) and (b) of this section, which amendment shall take effect as provided under paragraph (1).

**(B) Limitation**

The authority of subparagraph (A) may not be exercised –

(i) earlier than 6 months after the date of the adoption of the most recent resolution of disapproval with respect to any such amendment under this section; and

(ii) later than 2 years after the date of the adoption of any resolution of disaproval described in section 3417(c)(3) of this title with respect to the amendment required under subsection (a) of this section.

(Pub. L. 95-621, title II, § 202, Nov. 9, 1978, 92 Stat. 3372.)

3. Section 206(d) of the Natural Gas Policy Act of 1978, as codified at 15 U.S.C. § 3346(d), provides:

**§ 3346. Exemptions**

**(d) Other exemptions**

**(1) In general**

The Commission may, by rule or order, provide for the exemption, in whole or in part, of any other incrementally priced industrial facility or category thereof from the rule prescribed under section 3341 of this title (including any amendment under section 3342 of this title to such rule).

**(2) Congressional review**

Any rule which provides for any exemption under this subsection may take effect after the expiration of the first 30 calendar days of continuous session of Congress (determined in accordance with section 3417(b) of this title) after a copy of such rule has been submitted to each House of the Congress, unless, during such 30 day period of continuous session of Congress, either House of the Congress adopts a resolution of disapproval described in section 3417(c)(3) of this title, with respect to such rule.

(Pub. L. 95-621, title II, § 206, Nov. 9, 1978, 92 Stat. 3379.)

4. Section 506 of the Natural Gas Policy Act of 1978, as codified at 15 U.S.C. § 3416(a), provides in pertinent part:

**§ 3416. Judicial review**

**(a) Orders**

**(1) In general**

The provisions of this subsection shall apply to judicial review of any order, within the meaning of section 551(6) of title 5 (other than an order assessing a civil penalty under section 3414(b)(4) of this title or any order under section 3362 of this title or any order under section 3363 of this title), issued under this chapter and to any final agency action under this chapter required to be made on the record after an opportunity for an agency hearing.

**(2) Rehearing**

Any person aggrieved by any order issued by the Commission in a proceeding under this chapter to which such person is a party may apply for a rehearing within 30 days after the issuance of such order. Any application for rehearing shall set forth the specific ground upon which such application is based. Upon the filing of such application, the Commission may grant or deny the requested rehearing or modify the original order without further hearing. Unless the Commission acts upon such application for rehearing within 30 days after it is filed, such application shall be deemed to have been denied. No person may bring an action under this section to obtain judicial review of any order of the Commission unless –

(A) such person shall have made application to the Commission for rehearing under this subsection; and

(B) the Commission shall have finally acted with respect to such application.

For purposes of this section, if the Commission fails to act within 30 days after the filing of such application, such failure to act shall be deemed final agency action with respect to such application.

**(3) Authority to modify orders**

At any time before the filing of the record of a proceeding in a United States Court of Appeals, pursuant to paragraph (4), the Commission may, after providing notice it determines reasonable and proper, modify or set aside, in whole or in part, any order issued under the provisions of this chapter.

**(4) Judicial review**

Any person who is a party to a proceeding under this chapter aggrieved by any final order issued by the Com-

mission in such proceeding may obtain review of such order in the United States Court of Appeals for any circuit in which the party to which such order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia circuit. Review shall be obtained by filing a written petition, requesting that such order be modified or set aside in whole or in part, in such Court of Appeals within 60 days after the final action of the Commission on the application for rehearing required under paragraph (2). A copy of such petition shall forthwith be transmitted by the clerk of such court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to such order of the Commission shall be considered by the court if such objection was not urged before the Commission in the aplication for rehearing unless there was reasonable ground for the failure to do so. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as the court deems proper. The Commission may modify its findings as to the facts by reason of the additional

evidence so taken, and shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive. The Commission shall also file with the court its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

**(5) Orders remain effective**

The filing of an application for rehearing under paragraph (2) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under paragraph (4) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

**(b) Review of rules and orders**

Except as provided in subsections (a) and (c) of this section, judicial review of any rule or order, within the meaning of section 551(4) of title 5, issued under this chapter may be obtained in the United States Court of Appeals for any appropriate circuit pursuant to the provisions of chapter 7 of title 5, except that the second sentence of section 705 thereof shall not apply.

# Motion to Dismiss or Affirm

Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

Office - Supreme Court, U.S.
FILED
SEP 3 1982
ALEXANDER L. STEVAS,
CLERK

THE PROCESS GAS CONSUMERS GROUP, THE AMERICAN IRON AND STEEL INSTITUTE, AND THE GEORGIA INDUSTRIAL GAS GROUP,
*Appellants,*

v.

CONSUMER ENERGY COUNCIL OF AMERICA, CONSUMER FEDERATION OF AMERICA, and PUBLIC CITIZEN, INC.,
*Appellees.*

---

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA and UNITED DISTRIBUTION COMPANIES,
*Appellants,*

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
*Appellees.*

---

PETROCHEMICAL ENERGY GROUP,
*Appellant,*

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
*Appellees.*

---

AMERICAN GAS ASSOCIATION,
*Appellant,*

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
*Appellees.*

---

UNITED STATES SENATE,
*Petitioner,*

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
*Respondents.*

---

UNITED STATES HOUSE OF REPRESENTATIVES,
*Petitioner,*

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.*,
*Respondents.*

---

**APPEALS FROM AND PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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## MEMORANDUM OF APPELLEES-RESPONDENTS CONSUMER ENERGY COUNCIL OF AMERICA, CONSUMER FEDERATION OF AMERICA, AND PUBLIC CITIZEN IN RESPONSE TO JURISDICTIONAL STATEMENTS AND PETITIONS FOR WRITS OF CERTIORARI

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September 3, 1982

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

---

THE PROCESS GAS CONSUMERS GROUP,
THE AMERICAN IRON AND STEEL INSTITUTE,
AND THE GEORGIA INDUSTRIAL GAS GROUP,
*Appellants,*

v.

CONSUMER ENERGY COUNCIL OF AMERICA,
CONSUMER FEDERATION OF AMERICA, and
PUBLIC CITIZEN, INC.,
*Appellees*.*

---

INTERSTATE NATURAL GAS
ASSOCIATION OF AMERICA and
UNITED DISTRIBUTION COMPANIES,
*Appellants,*

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.,*
*Appellees.*

---

PETROCHEMICAL ENERGY GROUP,
*Appellant,*

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.,*
*Appellees.*

---

AMERICAN GAS ASSOCIATION,
*Appellant,*

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.,*
*Appellees.*

---

UNITED STATES SENATE,
*Petitioner,*

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.,*
*Respondents.*

---

UNITED STATES HOUSE OF REPRESENTATIVES,
*Petitioner,*

v.

CONSUMER ENERGY COUNCIL OF AMERICA, *et al.,*
*Respondents.*

---

**APPEALS FROM AND PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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** There are no parent companies, subsidiaries, or affiliates of any of the appellees-respondents.*

**MEMORANDUM OF APPELLEES-RESPONDENTS CONSUMER ENERGY COUNCIL OF AMERICA, CONSUMER FEDERATION OF AMERICA, AND PUBLIC CITIZEN IN RESPONSE TO JURISDICTIONAL STATEMENTS AND PETITIONS FOR WRITS OF CERTIORARI**

---

## STATEMENT OF THE CASE

### A. Statement of Facts

On May 6, 1980, the Federal Energy Regulatory Commission ("FERC" or the "Commission"), acting pursuant to section 202(a) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3342(a) (the "NGPA"), issued a regulation which is referred to as the Phase II incremental pricing rule. 5a. The purpose of the rule, which FERC was expressly required by statute to issue by May 9, 1980, was to shift some of the price increase resulting from the phased deregulation of natural gas from residential to industrial users. *Id.* On May 7, 1980, the Committee on Interstate and Foreign Commerce of the House of Representatives disapproved the rule, and on May 20, the House of Representatives, pursuant to section 202(c) of the NGPA, overwhelmingly voted to veto the rule to prevent it from going into effect. *Id.*

On June 5, 1980, acting pursuant to the requirements of 18 C.F.R. § 286.102 and 15 U.S.C. § 3416(a)(4), appellees-respondents Consumer Energy Council of America, Consumer Federation of America, and Public Citizen (the "Consumer Groups") petitioned FERC for rehearing on the ground that the House's veto was unconstitutional and therefore of no effect. 197a. They requested that the Commission delete the portion of its May 6 order which made its effectiveness conditional upon the failure of either House of Congress to veto the rule. On

August 1, 1980, the Commission denied the petition. Although recognizing that significant constitutional questions were raised by the veto, it declined to take sides on the merits. 197a-198a. But instead of leaving the matter in that posture, so that the Consumer Groups could have plainly sought judicial review of the denial and obtained a ruling on the veto's constitutionality, the Commission purported to revoke the rule, allegedly in order to rid the public of some ill-defined uncertainty but, quite obviously, in an effort to prevent the Consumer Groups from challenging the legality of the veto in court. 199a-203a.

In response, the Consumer Groups sought rehearing of the portion of the order which purported to revoke the May 6 rule. 205a. On October 2, 1980, that second petition for rehearing was denied. 204a-207a. Petitions for review were filed in the United States Court of Appeals for the District of Columbia Circuit with respect to both the August 1 and October 2 denials, and they were ordered consolidated. 6a.

Intervention was granted various industry groups whose members would have had to pay increased prices for natural gas if the incremental pricing rule went into effect, and the intervenors have appealed the decision of the D.C. Circuit to this Court (Nos. 81-2008, 81-2020, 81-2151, and 81-2171). In the Court of Appeals, FERC limited its arguments to a defense of the revocation of the rule and to its claim that the veto was not severable from the remainder of the statute authorizing incremental pricing. 6a. It has not, however, filed for review in this Court. In addition, the Executive Branch, appearing through the Department of Justice, appeared as an *amicus curiae* below, supporting the constitutional challenge to the veto, and the Senate and House of Representatives filed an *amicus* brief both urging the court not to reach the veto question and

defending the veto on its merits. *Id.* After the decision was issued, all three governmental parties were granted leave to intervene, and the Senate and House have filed petitions for writs of certiorari (Nos. 82-177 and 82-209).

## B. The Decision Below

No one disputes that the constitutionality of the veto of the Phase II incremental pricing rules presents a constitutional issue of great importance to the Executive Branch, the Congress, and the public. Nonetheless, all of the parties opposing the Consumer Groups in this action have made every effort to have the Court of Appeals and this Court avoid reaching it, with their principal focus on two arguments. First, they contend that, because of the Commission's August 1 revocation order, there is no incremental pricing rule that could go into effect even if the veto is held unconstitutional, and therefore the case is moot. Second, they argue that the provision containing the veto, section 202(c), is not severable from the provision authorizing the issuance of the Phase II rule itself, section 202(a), and thus, if the veto is unconstitutional, there is no authority to issue any rule, and hence the Consumer Groups could not benefit from a declaration that the veto is unconstitutional.[1]

The Court of Appeals in a unanimous opinion rejected both of these arguments. As to the revocation, it agreed with the Consumer Groups that FERC had violated the Administrative Procedure Act, 5 U.S.C. § 553, by failing

[1] In the Court of Appeals, the House and Senate argued that the court did not have jurisdiction, alleging that the constitutional challenge should have been brought in the District Court. That position was rejected by the court below, 17a-20a, and it has not been pursued in this Court. In addition, the Senate and House claimed that the case involved a political question, but the Court of Appeals also rejected that contention. 43a-50a.

to provide notice and an opportunity for public comment before revoking the Phase II rule. 31a-36a. In so ruling, the court found that the prior notice given with respect to the proposed incremental pricing rule was inadequate to cover the revocation, 32a-33a, and that the Commission lacked good cause for failing to provide for public comment. 35a-36a. Accordingly, it concluded that the revocation was void, and thus it did not have to reach the alternative argument made by the Consumer Groups that, due to the mandatory nature of the Phase II requirement imposed by section 202, FERC lacked the power to revoke the Phase II rule in its entirety. 31a.

The Commission also rejected the claim of nonseverability. Applying the test urged on it by all parties, as enunciated by this Court in *Champlin Refining Co. v. Corporation Comm'n,* 286 U.S. 210, 234 (1932), *quoted with approval in Buckley v. Valeo,* 424 U.S. 1, 108-109 (1976), 23a, the court found that if Congress had known that it could not have included a veto provision, it would still have required FERC to issue Phase II incremental pricing rules. 28a. The court did so based upon its detailed review of the legislative history of the NGPA and in particular the central role which both Houses assigned to incremental pricing as part of the compromise to reduce the price increases to residential users resulting from the NGPA's phased price deregulation. 24a-27a. By concluding that the veto was severable, the court avoided reaching the alternative argument made by the Consumer Groups that, if the veto were not severable, the incremental pricing authority was also not severable from phased deregulation. 21a-22a. In that event, the natural gas pricing laws would revert to what they were before the NGPA, which would mean greater price controls and hence lower prices for residential users.

On the merits, the Court of Appeals examined the debate surrounding the veto and found that the veto was predominantly legislative in character, since many members expressed the view in 1980 that they were simply taking a second look at what they did in 1978 and were using the veto to alter that prior policy determination. 79a-80a. The court found that, as a legislative act, the veto was unconstitutional because it did not comply with the lawmaking requirements of Article I, Section 7 of the Constitution, which mandate affirmative approval by two Houses of Congress and presentment to the President for either his signature or a veto. The court addressed at length the principal arguments advanced by the Congressional *amici* based on their expansive reading of the Necessary and Proper Clause of the Constitution – that the veto was similar to other actions properly taken by a single House, and that the rule sent to Congress was merely a proposal that, like any other Executive proposal which failed passage of both Houses, did not become law. As to the former, the court found that in some cases the actions were not similar to the veto and in others there was doubt as to the constitutionality of the actions relied on. 55a-64a. The court also rejected the characterization of the rule as a proposal and noted that Congress can act only through positive action, not by inaction. 74a-77a.

The court also examined the veto from a separation of powers perspective and found that it was unconstitutional under that analysis as well. 84a-103a. Thus, if the House were attempting to control, or share with FERC, the responsibility for administering the incremental pricing rules, it was acting unconstitutionally in performing an Executive function. 90a-99a. Similarly, if the House were interpreting the NGPA, and had concluded that the rule was not proper under it, it would have been overstepping its constitutional role by undertaking a function reserved

exclusively for the Judiciary. 100a-103a. Therefore, the Court concluded, regardless of whether the veto was seen as a Legislative, Executive or Judicial act, it was unconstitutional.[2]

Finally, the court turned to the question of relief. As the Consumer Groups recognized, the veto had deprived the industry parties, who would be adversely affected by the rule, of their opportunity to petition for rehearing or seek judicial review of the rule. In addition, the Consumer Groups acknowledged that, by the time the case is finally concluded, there may well be changed circumstances requiring a different rule from the one considered appropriate in 1980. Accordingly, they advised the court that they would not object if, upon remand, the Commission temporarily stayed the rule to allow for reconsideration in light of the then existing circumstances. In response, the Court of Appeals directed that its order invalidating the veto be stayed for 30 days after issuance of the mandate to permit the Commission to take whatever action it deemed appropriate at that time. 104a. As a result of subsequent orders of the Court of Appeals, and the filing of the jurisdictional statements and petitions for writs of certiorari in this Court, no further action has been taken by FERC, and the order below remains stayed.

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[2]Because of these rulings the Court of Appeals did not reach the alternative argument made by the Consumer Groups based on the doctrine of undue delegation. 37a & note 82.

## THIS COURT SHOULD LIMIT ITS REVIEW TO THE QUESTION OF THE CONSTITUTIONALITY OF THE VETO.

The four jurisdictional statements and two petitions for writs of certiorari present twenty-five questions for review. Even taking into account the overlaps between them, there are at least ten different issues raised. In addition, there are also alternative grounds for the rulings on revocation and severability, which were raised by the Consumer Groups below, but not reached by the Court of Appeals.

Since the Court of Appeals found section 202(c) of the NGPA to be unconstitutional, the case is properly here on appeal pursuant to 28 U.S.C. § 1252, although for reasons unstated in their papers, the Senate and House of Representatives have filed petitions for writs of certiorari. In any event, the sole basis for the appeal, and the only question worthy of plenary consideration by this Court, is the constitutionality of section 202(c) and the ensuing veto. While the Consumer Groups believe that a decision on the constitutionality of the legislative veto which is at issue in *Immigration and Naturalization Service v. Chadha,* (Nos. 80-1832, 80-2170 and 80-2171), would be dispositive of the constitutional question presented here, since the Court has ordered reargument in *Chadha,* consideration of the constitutional question in this context may aid the Court in its resolution of the issue presented there. Therefore, since an appeal from the declaration of unconstitutionality is properly before this Court, we do not object to plenary review of that issue.[3]

[3]Counsel for the Consumer Groups here also represent Mr. Chadha in his case, and all of the other parties in *Chadha* are also represented by the same counsel here. The only additional parties in this case are the four groups of industry appellants, only two of whom – the Interstate Natural Gas Association of America/United Distribution Companies and the American Gas Association – have presented the constitutional question in their jurisdictional statements.

None of the myriad of other issues presented deserves this Court's consideration. Several of the issues, such as political question, standing, and severability, are fully presented in *Chadha*. Whatever rulings need to be made by the Court on those questions can be done in that case and then simply applied here. The other principal questions involve the interpretation of the Administrative Procedure Act and were correctly decided below. *See also Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency,* _____ F.2d_____, (No. 81-2068) (3d Cir., July 8, 1982). Moreover, they present no significant issues for the Court, as evidenced by the fact that the Commission has not asked for further review of them even though it was entitled to do so as of right. Finally, the problem of relief, which is the only real concern of the industry appellants, is adequately resolved by the opportunity that the Commission has to consider the matter further on remand.[4]

[4]Of the remaining issues raised in the various filings, several seem to be directed to the validity of the underlying Phase II rule (question 4 of the Interstate Natural Gas Association, question 5 of the American Gas Association, and question 3 of the Petrochemical Energy Group). These questions are not at issue in this case, nor were they raised below. Others are related to this case, but were not adequately presented below, and therefore should not be considered by this Court (questions 3 and 5 of the House of Representatives and question 1 of the American Gas Association).

## CONCLUSION

For the foregoing reasons, this Court should grant plenary consideration limited solely to the question of the constitutionality of the legislative veto issued pursuant to section 202(c) of the Natural Gas Policy Act.

Respectfully submitted,

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September 3, 1982

# Brief for the United States

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Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209

# In the Supreme Court of the United States

OCTOBER TERM, 1982

PROCESS GAS CONSUMERS GROUP, ET AL., APPELLANTS
*v.*
CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, ET AL., APPELLANTS
*v.*
CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

PETROCHEMICAL ENERGY GROUP, APPELLANT
*v.*
CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

AMERICAN GAS ASSOCIATION, APPELLANT
*v.*
CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

UNITED STATES SENATE, PETITIONER
*v.*
CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER
*v.*
CONSUMER ENERGY COUNCIL OF AMERICA, ET AL.

*ON APPEALS FROM AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

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*Department of Justice*
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## QUESTION PRESENTED

The United States will address the following question:

Whether Section 202(c) of the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. IV) 3342(c), which authorizes one House of Congress to pass a resolution disapproving a rule adopted by the Federal Energy Regulatory Commission concerning the incremental pricing of natural gas, is unconstitutional because it contravenes the procedures established in Article I of the Constitution for the exercise of legislative power or because it violates the principle of separation of powers.

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No. 82-177

UNITED STATES SENATE, PETITIONER

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---

*ON APPEALS FROM AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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# MEMORANDUM FOR THE UNITED STATES

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## OPINION BELOW

The opinion of the court of appeals (J.S. App. 1a-104a)[1] is reported at 673 F.2d 425.

## JURISDICTION

The jurisdiction of the court of appeals was invoked under 15 U.S.C. (Supp. IV) 3416(a)(4) (J.S. App. 17a-20a). The judgment of the court of appeals was entered on January 29, 1982 (J.S. App. 208a-209a). The order of the court of appeals granting the motions of the United States House of Representatives, the United States Senate, and the United States for leave to intervene was entered on March 2, 1982 (J.S. App. 105a). A petition for rehearing was denied on March 10, 1982 (J.S. App. 210a). The notices of appeal in Nos. 81-2008, 81-2020, 81-2151 and 81-2171 were filed on March 15, 17,

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[1] "J.S. App." refers to the Appendix to the Jurisdictional Statement in No. 81-2008.

25 and 26, 1982, respectively (J.S. App. 213a, 215a, 217a, 220a),[2] and the jurisdictional statements were filed on April 29 and May 1, 21 and 24, respectively. On May 26, 1982, the Chief Justice granted the House of Representatives and the Senate an extension of time, to and including August 7, 1982, within which to file a petition for a writ of certiorari. The petition in No. 82-177 was filed by the Senate on August 2, 1982, and the petition in No. 82-209 was filed by the House of Representatives on August 6, 1982. The jurisdiction of this Court in Nos. 81-2008, 81-2020, 81-2151 and 81-2171 is invoked under 28 U.S.C. 1252, and the jurisdiction of this Court in Nos. 82-177 and 82-209 is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Pertinent provisions of Articles I, II and III of the United States Constitution are reproduced at J.S. App. 222a-224a.

2. Sections 201, 202, 206(d) and 506 of the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. IV) 3341, 3342, 3346(d) and 3416, are reproduced at J.S. App. 224a-231a.

## STATEMENT

1. Title I of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350, provides for the phased deregulation of natural gas prices. Title II provides for a system of incremental pricing to "eas[e] the transition to deregulation" (J.S. App. 7a). Incremental pricing is a mechanism for passing

[2] The Federal Energy Regulatory Commission also filed a notice of appeal, on March 25, 1982 (J.S. App. 219a), but it did not thereafter file a jurisdictional statement.

through to certain industrial users some of the increased price for natural gas resulting from phased deregulation, up to a level established by the cost of alternative fuels. It was designed to protect residential consumers against higher prices resulting from deregulation and to furnish some restraint on the prices paid by pipelines for natural gas supplies, particularly after deregulation, because large industrial users were expected to be especially price sensitive (*id.* at 7a-8a).

Under Title II of the Act, the implementation of incremental pricing is to occur in two phases. Section 201 of the Act, 15 U.S.C. (Supp. IV) 3341, directs the Federal Energy Regulatory Commission (FERC), within 12 months of the enactment date of the Act, to prescribe a rule providing for incremental pricing for the boiler fuel use of natural gas by any industrial boiler fuel facility. To implement Phase II, Section 202(a) of the Act, 15 U.S.C. (Supp. IV) 3342(a), in turn directs the Commission to prescribe an amendment to the Phase I rule, extending the rule generally to other industrial users of natural gas, not later than 18 months after the enactment date of the Act.

Under Section 202(c) of the Act, 15 U.S.C. (Supp. IV) 3342(c), the Phase II rule adopted pursuant to Section 202 must be submitted to each House of Congress. Section 202(c) provides that, following submission, the amendment "shall take effect" at the end of 30 calendar days of continuous session of Congress "unless, during such 30 day period * * * either House of the Congress adopts a resolution of disapproval * * * with respect to such amendment."

2. As required by Section 201, the Commission published a rule in October 1979 applying incremental pricing to industrial boiler fuel facilities.

44 Fed. Reg. 57726. On November 15, 1979, the Commission published a notice of proposed rulemaking for a Phase II rule extending incremental pricing to all industrial users of natural gas not specifically exempted under the Act. 44 Fed. Reg. 67170. On May 6, 1980, the Commission issued final Phase II regulations based on the notice issued the previous November (J.S. App. 12a, 123a-195a).

On the same day that the Commission adopted the Phase II rule, a resolution of disapproval (H.R. Res. 655, 96th Cong., 2d Sess. (1980); J.S. App. 222a) was introduced in the House of Representatives and referred to the House Committee on Interstate and Foreign Commerce. See 126 Cong. Rec. H3311 (daily ed. May 6, 1980). The relevant Subcommittee approved the resolution by voice vote that same day, and the full Committee did likewise on May 7, 1980. See H.R. Rep. No. 96-938, 96th Cong., 2d Sess. 5 (1980). In its report to the full House, dated May 12, 1980, the Committee explained its position by noting that conditions in the energy market and in the economy had changed considerably since the Act was passed in 1978 and that there had not yet been sufficient experience with incremental pricing under Phase I (*id.* at 8-9, 13-14). The Committee also took issue with what it characterized as the Commission's narrow interpretation of its authority under Section 204(e) of the Act, 15 U.S.C. (Supp. IV) 3344(e), to establish the alternative fuel cost. H.R. Rep. No. 96-938, *supra*, at 10-11. Comments during floor debate on the resolution echoed the Committee report's main themes. See 126 Cong. Rec. H3839-H3855 (daily ed. May 20, 1980); J.S. App. 14a-15a. On May 20, 1980, the resolution of disapproval passed the House by a vote of 369 to 34 (*id.* at 15a; 126 Cong. Rec. H3855 (daily ed. May 20, 1980)).

3. a. After passage of the resolution of disapproval, appellee-respondents Consumer Energy Council of America, Consumer Federation of America, and Public Citizen (collectively referred to herein as CECA) petitioned the Commission for rehearing. CECA sought an order making the Phase II rule effective, contending that the one-House veto provision in Section 202(c) of the Act is unconstitutional and that the resolution of disapproval passed by the House pursuant to that section therefore was of no legal effect (J.S. App. 15a).

By order dated August 1, 1980, the Commission denied the petition for rehearing and instead revoked the Phase II rule (J.S. App. 196a-203a). The Commission declined to pass upon the constitutionality of Section 202(c), stating that "sound administrative practice requires the presumption of constitutional validity of the statutes entrusted to this Commission for implementation" (J.S. App. 198a). The Commission noted, however, that an argument could be made that if the legislative veto provision in Section 202(c) were held invalid by a court, the Phase II rule would take effect. The Commission stated that it "ha[d] not yet independently evaluated whether the Phase II rule meets the social and economic goals of the Title II incremental pricing program" (J.S. App. 199a) and explained that it was revoking the rule to permit it to make such an evaluation (*ibid.*).

b. CECA petitioned for rehearing of the revocation order, asserting that the Commission had no substantive authority to revoke the Phase II rule and that, in any event, the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. 553, should have been followed (J.S. App. 16a). The Com-

mission denied the petition for rehearing by order dated October 2, 1980, concluding that Sections 201 and 202 of the Act empowered it to revoke the rule and that notice and comment requirements had been satisfied by the original notice of proposed rulemaking published on November 15, 1979 (J.S. App. 204a-207a). In the alternative, the Commission stated that there was "good cause" for dispensing with further notice and comment procedures (*id.* at 206a-207a, citing 5 U.S.C. 553(b)).

4. CECA then filed a petition in the United States Court of Appeals for the District of Columbia Circuit seeking review of the Commission's orders of August 1 and October 2, 1980 (J.S. App. 16a), again contending that Section 202(c) of the Act is unconstitutional. The United States Senate and House of Representatives appeared as amici curiae supporting the constitutionality of Section 202(c), and the United States appeared as amicus curiae arguing that the legislative veto provision is unconstitutional. FERC did not take a position on the constitutional question.

a. As an initial matter, the court disposed of a number of subsidiary issues raised by the House and Senate and by FERC: [3]

First, the court rejected the argument that it was unnecessary to decide the constitutional question because the legislative veto provision in Section 202(c) of the Act is not severable from the authorization in Section 202(a) and (b) for the promulgation of a

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[3] In addition to the issues discussed in the text, the court rejected the arguments that the court of appeals did not have statutory jurisdiction of the case under 15 U.S.C. (Supp. IV) 3416 (J.S. App. 17a-20a) and that the constitutionality of the legislative veto presents a non-justiciable political question (*id.* at 43a-49a).

Phase II rule and that petitioners therefore were not in any event entitled to effective relief (J.S. App. 21a-30a). The court concluded, after reviewing the legislative history, that Congress would have enacted Phase II of the incremental pricing mechanism without the legislative veto device and that Section 202(c) thus was severable from the statutory authorization in Section 202(a) and (b) for issuance of a Phase II rule (J.S. App. 24a-30a). The court noted in this regard that the legislative veto provision was not contained in the incremental pricing bills passed by either House. Instead, the court observed, the veto provision was added by the conference committee, which failed even to mention, much less emphasize, this feature in the portion of its report that summarized Title II of the Act. This history, the court explained, "militates against the view that the veto provision was essential to the incremental pricing and [Natural Gas Policy Act] compromises" (*id.* at 25a).

The court of appeals also held that the case was not moot by virtue of FERC's attempted revocation of the Phase II rule, finding that FERC had failed to provide the notice and opportunity for comment required by the APA in order for the revocation to become effective (J.S. App. 31a-34a). The court rejected the Commission's contention that the opportunity for notice and comment provided in connection with the initial promulgation of the Phase II rule was sufficient to cover the order of revocation because one of FERC's options at the outset was to adopt no Phase II rule at all. The court noted that the APA defines the term "rule making" to include the process for repeal as well as adoption of a rule (5 U.S.C. 551(5)) and reasoned that this definition would have been unnecessary if notice and comment prior to adoption of a rule were

sufficient to encompass later repeal. In addition, the court remarked that the issues involved in the revocation decision—the constitutionality of the legislative veto and the consequenecs that might follow from a judicial decision—were different from those raised in the initial rulemaking proceeding (J.S. App. 32a-34a).

The court of appeals rejected the contention that FERC had "good cause," within the meaning of 5 U.S.C. 553(b)(B), to dispense with notice and comment procedures. The court observed that FERC had merely asserted that notice and comment were "unnecessary," without stating its reasons in the revocation order itself, as explicitly required by 5 U.S.C. 553(b)(B), and held that in any event no emergency existed warranting FERC's decision not to afford the public an opportunity to participate (J.S. App. 35a-36a).

b. On the merits, the court of appeals held unconstitutional the legislative veto provision in Section 202(c) of the Act for two independent reasons. First, it held that the authorization for one House of Congress to adopt a resolution disapproving a rule promulgated pursuant to an Act of Congress violates the explicit requirements of Article I, Sections 1 and 7 of the Constitution, which the court described as establishing the "fundamental prerequisites to the enactment of federal laws" (J.S. App. 55a).

The court read the debates of the Constitutional Convention and the *Federalist* papers to reflect a concern on the part of the Framers to protect against improvident and encroaching action by the Legislative Branch and the possibility that majorities in the National Legislature might exercise unconstrained power that could destroy the power of the States. In the court's view, the Great Compromise, dividing the Con-

gress into two Branches, one representing the people and the other the States, served to guard against the latter eventuality, and the requirement of concurrent action by these two differently constituted bodies served as a check against the former (J.S. App. 70a-71a). Similarly, the court held that the provision for presentation of all legislative measures to the President for his approval or disapproval was intended by the Framers to be a "defensive weapon against legislative intrusions on the powers of the Executive" (*id.* at 64a) and a "check against ill-advised legislation" (*id.* at 65a). These important purposes underlying the procedural requirements for the exercise of power by the Legislative Branch required rejection of the suggestion that a legislative veto of agency action is exempt from those requirements.

The court "emphatically reject[ed]" the argument that the Phase II rule never had legal effect in the first place but rather was merely a "proposal" that could be rejected by one House of Congress without compliance with the bicameralism and presentation requirements. The court observed that the one-House veto "effectively changed the law by altering the scope of FERC's discretion and preventing an otherwise valid regulation from taking effect" (J.S. App. 74a). The court noted that a rule which is not disapproved does not die, as does a bill that fails to pass both Houses of Congress; rather, such a rule has legal force as the product of a valid authorization conferred on an agency by an Act of Congress (*id.* at 74a-79a). To render invalid a rule issued pursuant to such authorization, the court concluded, requires adherence to the "same procedure" followed in conferring the authorization in the first place, that is, concurrence of both Houses of Congress and presentation to the President for approval or veto (*id.* at 80a). Con-

versely, the court stated that "[i]f Congress had wanted FERC merely to propose an extension of incremental pricing to be accepted or rejected by Congress, it could have so provided" (*id.* at 74a-75a).

The court of appeals also held that the legislative veto violates the constitutional doctrine of separation of powers (J.S. App. 84a-103a). The court noted that this Court held in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), that the issuance of regulations represents the performance of a significant governmental duty pursuant to public law and therefore must be exercised by "Officers of the United States" appointed either by the President or as otherwise provided by the Appointments Clause (Article II, Section 2, Clause 2), not by officers appointed by Congress (J.S. App. 91a, quoting 424 U.S. at 140-141). In the court of appeals' view, it followed a fortiori from this holding that Congress itself likewise is prohibited from interfering in the rulemaking process, for "[i]t would be anomalous in the extreme to hold that Congress may not appoint the officials who make rules, but may enact a mechanism permitting effective congressional control over these officials' decisions" (J.S. App. 92a-93a).

The court rejected the suggestion that the Commission's status as an "independent agency" alters the separation of powers analysis (J.S. App. 88a-90a). The court noted that the status of the Federal Election Commission as an independent agency did not prevent this Court in *Buckley* from employing the separation of powers doctrine as the basis for reviewing the constitutionality of the statute establishing the Commission. The court recognized that the President "does not have a claim to control the decisionmaking of independent agencies" (*id.* at 89a). But the court found it to be "an enormous, and unwarranted, jump from this to the conclusion that Congress may itself

interfere with an independent agency's decisions without regard to separation of powers. Although FERC is substantially independent of the Executive, it nonetheless performs executive functions" (*ibid*).

c. In view of its decision on the merits, and its holding that FERC had not validly revoked the rule, the court of appeals concluded that the rule should go into effect. However, the court granted a stay of the effective date to permit the Commission an opportunity to reconsider the rule (J.S. App. 104a). After the court entered its judgment, the Senate, House of Representatives, and the United States were granted leave to intervene (*id.* at 105a).

## DISCUSSION

Like the Ninth Circuit in *INS* v. *Chadha*, No. 80-1832, the court of appeals in this case has held unconstitutional a provision in an Act of Congress authorizing one House of Congress to adopt a resolution, without the concurrence of the other House or presentation to the President, that nullifies an order issued by a federal agency pursuant to its statutory mandate. The constitutionality of the legislative veto device presents an issue of the most fundamental nature regarding the distribution of powers among the coordinate branches of the federal government and the manner in which those powers may be exercised. That issue manifestly warrants, and already has been granted, plenary review by this Court. *INS* v. *Chadha* was fully briefed and argued last Term, and it has been set for reargument this Term. The same constitutional principles that govern *Chadha* govern this case as well, and the Court's decision in *Chadha* will, we believe, control here.

To be sure, this case involves a legislative veto of a rule, not an order entered at the completion of an

adjudicatory process, as in *Chadha*. In addition, the Officers of the United States responsible for promulgation of the rule in this case—the members of the Federal Energy Regulatory Commission—may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office (42 U.S.C. (Supp. IV) 7171(b)); they are not subject to removal by the President at will, as is the Attorney General, whose order of deportation was the subject of the legislative veto involved in *Chadha*. But neither of these differences between the two cases has any bearing on the resolution of the constitutional issue.

1.a. As we have explained in our Brief in *Chadha* (at 17-43), the explicit procedural requirements of bicameral action and presentation to the President set forth in Article I, Section 7 of the Constitution apply in all instances in which Congress seeks to exercise its legislative powers and thereby affect the legal rights and duties of persons outside the Legislative Branch. With respect to the requirement of bicameralism, this is clear from Article I, Section 1, which vests "*All* legislative Powers" jointly in the Senate and House of Representatives, and from Article I, Section 8, which provides that "The Congress," not either of its Houses standing alone, shall have the enumerated powers. With respect to the requirement of presentation to the President, Clause 2 of Article I, Section 7 makes clear that "*Every* Bill which shall have passed the House of Representatives and the Senate" must be presented to the President (emphasis added). And if there were any doubt, Clause 3 of the same section provides that "*Every* Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary" (emphasis added)—*i.e.*, all resolutions and votes constituting the exercise of the legislative powers conferred by

Article I, Sections 1 and 8—must be presented to the President, even if not actually in the form of a bill.

In view of the explicit and all-embracing constitutional text, the requirements of bicameralism and presentation to the President apply whether the conduct that is the subject of the congressional action is that of the President himself, subordinate officials in the Executive Branch subject to his control, the members of an "independent agency" who may be removed by the President only for cause, or members of the Judiciary, who are entirely independent of the President. These procedural requirements also must be followed whenever the legislative action will have a legal impact on private parties, as the resolution of disapproval in this case plainly did: absent the legislative veto, the Phase II rule issued by FERC pursuant to public law would have gone into effect and altered the prices consumers paid for natural gas. Moreover, just as the explicit text of Article I, Section 7 requires bicameral action and presentation to the President in the case of public laws of general applicability as well as private laws affording relief or benefits to an individual person, so too that text forecloses a legislative veto of agency action that does not comport with the constitutional requirements, irrespective of whether the veto disapproves an order adopting a rule affecting the public at large, as in this case, or an order entered at the conclusion of an adjudicatory proceeding that affords relief or benefits to an individual person, as in *Chadha*.

b. The intent of the Framers underlying the pertinent constitutional provisions no more permits any distinction to be drawn between *Chadha* and this case than does the text of the Constitution itself. The requirements of bicameral action and presentation to

the President were intended to serve as formidable checks against improvident action by the Legislative Branch by ensuring an opportunity for due deliberation by the two differently constituted Houses and an independent review by the President. See our Brief in *Chadha*, at 28-31. In this case, the court of appeals found that a principal reason for the passage of the resolution of disapproval was the dissatisfaction of many Members of the House of Representatives with the statutory policy of incremental pricing embodied in the Natural Gas Policy Act of 1978, in light of changed circumstances, and their view that this statutory policy should be abandoned or its implementation delayed. See J.S. App. 13a-15a, 79a-80a. As the court below observed, such alteration of policy embodied in a previously enacted law "is precisely the kind of decision that the Constitution envisions will be made only by both houses with the participation of the President through his veto power" (*id.* at 80a).

The requirements of bicameralism and presentation to the President also were intended to prevent an aggrandizement of the Legislative Branch at the expense of the other two Branches, and the Presidential veto power therefore also serves in part as a defensive weapon by which the President may protect against encroachment by the Legislative Branch. See our Brief in *Chadha*, at 27-28, 29-30. A legislative veto of an order issued by an independent agency does not nullify a specific action that was subject to the President's control. But this hardly renders the Presidential veto power superfluous, even to the extent it is viewed as a means of defense against aggrandizement and encroachment by the Legislative Branch.

Members of an independent agency such as FERC, no less than members of the Cabinet subject to Presi-

dential direction, are Officers of the United States appointed by the President and responsible for the administration of public laws. See *Buckley* v. *Valeo*, *supra*, 424 U.S. at 140-141. The President's broad constitutional obligation to "take Care that the Laws be faithfully executed" (Article II, Section 3)—even if he cannot actually direct the *manner* of their execution in a particular instance—therefore requires preservation of the President's veto power within the system of checks and balances fashioned by the Framers as a defensive mechanism to protect against encroachment by the Legislative Branch upon the administration of the laws even by independent agencies. Indeed, precisely because the day-to-day administration of the laws by an independent agency is not subject to Presidential control, it is critical that the President's veto power be preserved undiminished to enable him at least to exercise the detached review of legislative measures the Framers intended when Congress, or one of its Houses, seeks to alter the manner in which such an agency carries out its statutory mandate.[4]

Moreover, if the check of the Presidential veto power could be readily circumvented by Congress merely by vesting authority to administer the laws in an independent agency not subject to the President's direct control, Congress could be expected to pursue that course, thereby further encroaching upon the President's administration of the laws generally and his responsibility to review legislative measures intended to alter the manner in which the laws are

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[4] The Presidential veto power also may serve to prevent aggrandizement of the Legislative Branch at the expense of the Judiciary, which likewise is independent of Presidential control.

carried out. Thus, recognition of a power in Congress or one of its Houses to exercise a veto over the action of an independent agency in enforcing the laws, without presentation of the measure to the President, could substantially diminish the stature of the President in the tripartite system of government embodied in the Constitution. Such a result would quite directly implicate the self-defensive purposes of the Presidential veto power.

2.a. For reasons similar to those just discussed, the fact that the instant case involves rulemaking and an independent agency does not affect the second ground on which legislative veto devices are unconstitutional: their incompatability with the doctrine of separation of powers. The Court held in *Buckley* v. *Valeo* that the performance of any significant governmental duty pursuant to a public law must be performed by Officers of the United States appointed by the President or otherwise in accordance with the Appointments Clause; those duties may not be performed by officials appointed by Congress. As we explain in our Brief in *Chadha* (at 48-50), it follows a fortiori from *Buckley* that if Congress cannot appoint those who will administer the law, it cannot take the more extreme step of actually reserving to itself the ultimate determination of how the laws will be administered. And because the Court's opinion in *Buckley* explicitly applies to rulemaking (424 U.S. at 140), the doctrine of separation of powers invoked in *Buckley* likewise bars a legislative veto of agency rulemaking.

b. The conclusion that the legislative veto violates the doctrine of separation of powers is not altered by the fact that the members of FERC may be removed by the President only for cause. As the court

of appeals observed (J.S. App. 88a-89a), this Court in *Buckley* applied the doctrine and its particular manifestation in the Appointments Clause in the context of the Federal Election Commission, which also is an independent agency. It is true that the President does not have the degree of control over the decisionmaking of independent agencies that he does with respect to actions of Officers of the United States who are subject to his removal at will. But as the court below observed, "it is an enormous, and unwarranted, jump from this to the conclusion that Congress may itself interfere with an independent agency's decisions without regard to separation of powers" (J.S. App. 89a). If Congress reserves to itself or one of its Houses the authority to veto orders issued by an independent agency, it possesses the power both to make the law and participate in its execution—the very concentration of powers in the Legislative Branch that the Framers intended to foreclose.

3. The Constitution thus furnishes no basis for distinguishing this case from *Chadha* with regard to the validity of the legislative veto. Indeed, the Senate and House of Representatives do not argue that the two cases are constitutionally distinguishable. At the same time, we fully appreciate that the fundamental importance of the constitutional issue presented may lead the Court to conclude that it should have before it the experience with a second legislative veto in order to assure that all aspects of the issue have been addressed.[5]

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[5] A constitutional challenge to the two-House legislative veto provision in Section 21(a) of the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 393, 15 U.S.C. (Supp. IV) 57a-1(a), is now pending be-

4. In any event, whatever considerations might warrant plenary review in this case of the constitutionality of the legislative veto device plainly do not extend to the various subsidiary issues on which a number of parties also have sought review. A proliferation of such issues would detract from the Court's and the parties' consideration of the fundamental constitutional question.

Thus, for example, the question whether FERC was required to comply with the notice and comment requirements of the APA when it revoked the Phase II rule is not one of general importance, and FERC itself has not sought review on that issue. The court of appeals made clear that FERC could reconsider the wisdom of the rule in proceedings on remand (J.S. App. 104a).[6] This Court's refusal to consider the validity of FERC's revocation therefore would not result in the imposition of a Phase II rule that has not received appropriate scrutiny by the agency in light of changed circumstances.

Similarly, the questions of standing, political question, and adverseness of parties presented by the House (82-209 Pet. I (Questions 4, 5 and 6), 22-23,[7] are essentially identical to those presented by the House in its brief in *Chadha* and need not be re-

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fore the United States Court of Appeals for the District of Columbia Circuit in a case involving a veto of the FTC's rule concerning deceptive commercial practices in sales of used cars. *Consumers Union of the United States* v. *Federal Trade Commission*, No. 82-1737. That case is scheduled for argument on October 12, 1982.

[6] FERC has not yet taken action on remand in light of the appeals and certiorari petitions filed in this case.

[7] See also 81-2171 J.S. I (Question 1), 13-17).

hearsed here. By the same token, the questions regarding the scope of FERC's rulemaking discretion under Phase II and whether that discretion reflects an undue delegation of authority by Congress (81-2008 J.S. 13-14; 81-2020 J.S. I (Question 4), 25-27) were adverted to only briefly by the court of appeals (J.S. App. 78a n.172), which found that Congress had in fact made a policy judgment in favor of incremental pricing (*id.* at 79a). In any event, consideration of this issue would be premature in the context of the Phase II rule: that rule will not go into effect if the legislative veto is constitutional, and the rule will be the subject of further proceedings before FERC if the veto is unconstitutional and severable, as the court below held.

## CONCLUSION

If the Court concludes that consideration of the constitutionality of the legislative veto in *Chadha* would be assisted by having this case before it as well, the Court should note probable jurisdiction in Nos. 81-2020 and 81-2171, which present the constitutional question. In that event, the Court also should grant the certiorari petitions filed by the House and Senate in Nos. 82-177 and 82-209, limited to the questions whether Section 202(c) of the Natural Gas Policy Act is unconstitutional and, if so, whether Subsection (c) is severable from the remainder of Section 202. The Court should limit the briefing in Nos. 81-2020 and 81-2171 to these issues as well. The appeals in Nos. 81-2008 and 81-2151 should be dismissed because they do not seek review of that aspect of the court of appeals' decision holding Section 202(c) of the Natural Gas Policy Act unconstitutional, which would appear to be a require-

ment for invoking the jurisdiction of this Court under 28 U.S.C. 1252.[8]

Respectfully submitted.

REX E. LEE
*Solicitor General*

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[8] The first paragraph of Section 1252 provides that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order * * * holding an Act of Congress unconstitutional * * *." This language would appear to link the right of appeal to the holding of unconstitutionality by the lower court. See also *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975). Where an appeal pursuant to the first paragraph of Section 1252 has been taken, the second paragraph of Section 1252 provides that all other appeals or cross-appeals in the case shall be taken to the Supreme Court. It is this paragraph that would seem to apply to non-constitutional issues. Cf. R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978). When a district court disposes of a non-constitutional issue, appeal ordinarily would be to the court of appeals pursuant to 28 U.S.C. 1291; it presumably is such appeals of right that the second paragraph contemplates will be taken instead to the Supreme Court. There is no independent right of appeal to this Court from a decision of a court of appeals on a non-constitutional issue, and the second paragraph of Section 1252 does not confer such a right merely because some other party has filed an appeal with respect to the constitutional issue. We have addressed a close variant of this question of statutory construction in our Motion to Dismiss in *Beneficial Finance of Kansas, Inc.* v. *United States*, No. 81-583 (filed Nov. 25, 1981).

Treating these jurisdictional statements as petitions for a writ of certiorari (see 28 U.S.C. 2103), the petitions should be denied, because they raise no issue of general importance warranting this Court's discretionary review.

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